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1945

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

PROBATE, DIVORCE,

AND ADMIRALTY DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL:

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR - - - - RALPH SUTTON, K.C.

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Admiralty Cases -	E. C. M. TREHERN, H. GREENFIELD,	*Barristers-at-Law.*
Ecclesiastical Cases	W. L. L. BELL,	*Barrister-at-Law.*

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DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

HOWARD *v.* HOWARD.

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Nov. 29. 30.

Lord Greene M.R. MacKinnon and du Pareq L.JJ.

Divorce—Maintenance—Husband's reduced means—Application for reduction of maintenance—Marriage settlement—Discretionary trust of which husband only one of the objects—Intimation by trustees that husband will receive nothing for some time—Order for maintenance leaving husband without sufficient to live on—Purpose of order—Pressure on trustees to exercise discretion in favour of husband—Jurisdiction.

On an application for reduction of the maintenance granted to a wife when she divorced her husband, the court, in fixing the reduced maintenance, has no jurisdiction to make an order that will leave the husband without sufficient to live on with a view to putting pressure on trustees, holding a trust fund on discretionary trusts, to exercise their discretion in favour of the husband as an object of the discretionary trust. It is only when the husband is receiving regular payments from the trustees under the discretionary trust that these payments can be taken into account as part of the husband's means.

APPEAL from Barnard J.

By an ante-nuptial settlement dated January 10, 1938, made on the marriage of the Hon. John Algernon Frederick

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Charles Howard (hereinafter called the husband) and Suzanna Patricia McCassey (hereinafter called the wife) the husband's great-aunt covenanted to pay to the trustees during her life a monthly sum of 37*l.* 10*s.*, to be held by the trustees during the life of the husband upon protective trusts and to be paid and applied by them to or for the benefit of the husband and of any wife whom he might marry and the child children or issue of the husband by any wife whom he might marry or any of them as the trustees in their absolute discretion might think fit. The settlement contained provisions enabling the great-aunt to pay the sum of 12,000*l.* in satisfaction of her liability under the covenants to the trustees to be held (so far as material) on the same trusts as were declared concerning the monthly sum of 37*l.* 10*s.* The great-aunt in fact paid that sum to the trustees.

On January 18, 1943, the wife obtained a decree absolute for the dissolution of the marriage, and she applied for maintenance and variation of the settlement. At this time the husband's means were 312*l.* a year, his earnings in war work, an allowance of 150*l.* a year, and 502*l.* a year received from the trustees of the marriage settlement. An order was made for the husband to pay the wife 150*l.* a year maintenance, and the settlement was varied by directing the trustees to pay to the wife for her life dum casta et sola out of the settlement funds the yearly sum of 150*l.*, less tax. The husband had since been adjudicated a bankrupt and had received his discharge. The wife having remarried, the husband applied for the maintenance to be reduced to a nominal sum. By his affidavit, dated May 11, 1944, he said that since December 22, 1943, he had been seriously ill and had undergone a severe operation; that he was advised that it would be a considerable time before he was fit for anything but very light work; that as regards the settlement fund the trustees had informed him that he would receive no payment from it for a considerable time as they had allocated income to the maintenance of his son and to paying medical expenses and his legal costs of the divorce proceedings; and that in consequence his income was reduced to 150*l.* a year.

The Registrar made an order reducing the maintenance to a shilling a week, but on appeal, Barnard J. ordered the husband to pay the wife as maintenance 100*l.* a year. It was stated by counsel that seemingly Barnard J., in making this order, intended to bring pressure on the trustees to exercise their

discretion under the discretionary trust to an extent sufficient to provide the husband with enough to live on. The husband appealed.

Fairweather for the husband. Barnard J. has exercised his discretion wrongly in ordering the husband to pay the wife maintenance so far beyond his means. The husband had been left with barely enough to live on, and the Registrar, in granting only nominal maintenance to the wife, acted rightly. The husband was receiving nothing under the discretionary trust and Barnard J. ought not to have taken it into account. It must be remembered that the wife had remarried and had another husband to maintain her, and that the child of the marriage was being provided for by the trustees of the marriage settlement under the discretionary trust. It is a case where the Court of Appeal can exercise their discretion, as it has been wrongly exercised by the judge below. [He referred to *Perkins* v. *Perkins* (1).]

Elder Jones for the wife. It is admitted that the judge has a discretion in regard to granting maintenance, but it is almost always exercised in favour of the wife, unless she has large private means. It was within Barnard J.'s discretion to give the wife 100*l.* a year, having regard to the existence of the discretionary trust, which could be exercised in the husband's favour, but, without prejudice to this contention, it is submitted that the wife should at least receive 50*l.* a year. [He referred to *Ackworth* v. *Ackworth* (2).]

Fairweather in reply.

LORD GREENE M.R. This appeal raises a question of some importance with regard to the practice in the Divorce Division, in settling maintenance to be paid by a divorced husband to his former wife under s. 190 of the Judicature (Consolidation) Act, 1925, as amended by s. 14, sub-s. 2, of the Administration of Justice (Miscellaneous Provisions) Act, 1938. [His Lordship stated the facts and continued :] Barnard J.'s order invites the inquiry how it came about that the learned judge in the exercise of his discretion thought it right to make an order for maintenance that left the husband with only 50*l.* a year to live on. It is perfectly true, of course, that these orders are discretionary, and it is only when sufficient circumstances appear that this court will interfere with the exercise of that

(1) [1938] P. 210, 214. (2) [1943] P. 21.

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discretion. But the mere facts here are very striking and suggest an inquiry as to the principle on which the learned judge acted. It appears that the wife's costs of the divorce proceedings have not been paid. A proof was put in in the bankruptcy of the husband. Whether any and what dividend was paid on it I do not know, but in any event there still remains owing by the wife to her solicitors a substantial sum for costs, and it is fairly plain from what we have been told that the wife really wants to get money from the husband in order that she may pay her solicitors. I do not allow my mind to be influenced by that circumstance, because there is another and much more serious aspect of this case, as it seems to me. Mr. Elder Jones informed the court that seemingly the basis of the learned judge's decision was that he took the view that if he made an order of this kind the effect would be to bring pressure on the trustees to make to the husband an allowance out of the settlement income. If that was the object of this order, it was, in my opinion, entirely wrong in principle. Trustees who have a discretion are bound to exercise it, and if they do so nobody can interfere with it. In my opinion there is no jurisdiction in the Divorce Court to make an order which will leave the husband in a state of starvation (to use rather picturesque language) with a view to putting pressure on trustees to exercise their discretion in a way in which they would not have exercised it but for that pressure. Under discretionary trusts (as, indeed, under this trust) other persons are potential beneficiaries. In many such trusts the range of potential beneficiaries is a very wide one. Here it extends to any future wife that the husband may marry and the children of any future marriage. The settlement has not been varied in that respect. On what ground should pressure be put upon the trustees to exercise their discretion in such a way as to pay to the husband, in order that he may pay maintenance to his wife, sums which in their discretion they would not otherwise have paid to him.? It seems to me that such an order is as bad as an order on a man to pay a sum far in excess of what he could be ordered to pay out of his own means merely to put pressure on a rich relation to support him. That is not within the scope of s. 190 of the Act. What has to be looked at is the means of the husband, and by " means " is meant what he is in fact getting or can fairly be assumed to be likely to get. I must not be misunderstood. It is, of course, legitimate (as was done in this case) to treat

a voluntary allowance as something which the court can, in proper circumstances, infer will be likely to continue, and make an order on that basis. If and when the allowance is cut off, the husband can come back and apply to have the order modified. Similarly, in the case of a discretionary trust, if the court finds that the husband is in fact receiving regular payments under such a trust it is perfectly entitled to make an order on the footing that those payments will in all probability continue, leaving it to the husband to come back to the court if at some future date they are stopped. But in this case the trustees have exercised their discretion so that the husband will, as frequently happens under these discretionary trusts, get nothing. Trustees, for very good reasons, often do not give money to the husband and the only object of this order, so we are told, was to induce the trustees to change their decision as to the proper disposition and administration of this trust income. The trustees, if they were well advised, would say: "We have exercised our discretion and we refuse "to change it. It is only when circumstances alter that we "shall take them into account and exercise our discretion in "a way suitable to the altered circumstances as we see them." If they were to do that the husband would be left with a voluntary allowance of 150*l.* out of which he has to pay 100*l.* to the wife, who has remarried.

In my opinion the practice, if it be a practice, indirectly to put pressure on trustees in this sort of way to commit a breach of their duty and to exercise their discretion in a way contrary to what they desire, is wrong. I say nothing as to the jurisdiction of the court to make variation orders in the matter of discretionary trusts. I assume that such orders can properly be made. If that be the case, obviously on an application to vary a settlement the difficulty can perfectly well be avoided by varying the settlement so as to make a sum payable to the husband and then making an order for maintenance on the basis that this sum forms part of his income. Nothing of the kind has been done here. The discretion of the trustees has not been affected. The result is that they are bound by law to exercise their discretion properly, and it is not right that the court, by making so stringent an order against the husband that he will have only 50*l.* left on which to live, should endeavour to put pressure on them.

There is one matter, however, which I think I should mention. I have already pointed out that if, in fact, when an application

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of this kind comes before the court it is found that the husband is enjoying, either in meal or in malt, benefits which can fairly be regarded as forming part of his normal income—if, for instance, he is being paid a sum of money out of the income or if the trustees are paying his tailor's bills or his butcher's bills—the court would be perfectly justified in saying: "This "allowance has been de facto enjoyed by the husband; there "is nothing to suggest that it will not be continued, and we shall "assume until circumstances change that that is part of his "income, and we shall bear that in mind in settling the amount "of the maintenance." That being so, the wife would be entitled, if she discovered that such payments were at some future date being made, to come back to the court. Let me not be misunderstood about this. I am not suggesting that such an application, if and when it came to be made, would necessarily or properly be granted. Whether it should or should not be granted, and to what extent, must depend entirely on the circumstances existing when the application is made. My words must not be quoted as suggesting in any way that the wife would be entitled to have the order which we are making varied, merely by showing that the husband was in fact receiving some benefit. Whether she ought to have the order varied in that event must depend entirely on the circumstances as they then exist; and if she chooses to make an application she must, of course, make it at her own risk. In order to see that the wife is supplied with such information as will enable her to know what the husband is getting by way of benefit, Mr. Fairweather, on behalf of the husband, is prepared to undertake to furnish periodically to the wife—and I think six-monthly intervals would be sufficient—a statement of all benefits (if any) which he is receiving out of the income from the trustees, stating the nature of those benefits. If once every six months that information is given to the wife she will be in a position to decide whether or not it is worth her while to attempt to have this order varied.

The result, therefore, is that the appeal will be allowed and the decision of the Registrar restored, but the order of this court will be prefaced by Mr. Fairweather's undertaking.

MACKINNON L.J.: I agree. The power of the court, after a decree of divorce, to vary settlements with the object of providing alimony was, I think first conferred by s. 5 of the Matrimonial Causes Act, 1859, which was replaced by s. 190,

sub-s. 2, of the Judicature (Consolidation) Act, 1925. That refers in terms to nuptial settlements made "on the parties," by which, I think, is meant settlements under which the late spouses or one of them are cestuis que trust and, therefore, entitled to call upon the trustees to account. A settlement by the terms of which the trustees may at their discretion use the capital or income for the benefit of persons they may select would not seem to be such a settlement merely because the spouse or spouses is or are within the class of possible beneficiaries whom the trustees in their discretion are entitled to select. But as this question has not been fully explored in the argument before us, I do not wish to be taken as expressing a definite opinion on it.

DU PARCQ L.J.: I also agree that the appeal should be allowed. I think we are forced to the conclusion that the learned judge has taken a wrong view of the powers of the court. I entirely agree with the Master of the Rolls that it is wrong to make an order with a view to putting pressure on trustees who have a discretion. Generally speaking, it is necessary to look at what the husband has or is earning in the way of income. There is certainly this exception, I think, that if the husband could have more in the way of income if he liked to make an effort to get it the court will have regard to what he could have if he liked. That was the old rule of the Ecclesiastical Courts, and it seems to me a rule of common sense when one is now considering what order should be made under s. 190, sub-s. 2, of the Judicature (Consolidation) Act, 1925. Dealing with the old practice, Lord Merrivale, in *N.* v. *N.* (1) said: "The court not only ascertained what moneys the "husband had but what moneys he could have if he liked, "and the term 'faculties'"—that is the term used in the old days—"describes the capacity and the ability of the "respondent to provide maintenance." That, of course, is a very different thing from saying that regard can be had to what he might have if other people exercised a discretion in his favour. To attempt to put pressure on trustees who have such a discretion must be quite wrong.

Appeal allowed.

Solicitors: *Ralph Bond & Rutherford; Gordon, Dadds & Co.*

(1) (1928) 44 T. L. R. 324, 327.

H. C. G.

C. A.

1944

Dec. 11, 12.

Scott, MacKinnon and du Parcq L.JJ.

THE LINDENHALL.

Shipping—Damage—Explosion of enemy mine—Liability of port authority—Negligence—Towage contract—Indemnity—Party and party claims.

While in tow of two tugs belonging to the defendants, a port authority, the plaintiffs' vessel received damage in a dock controlled and managed by the defendants. The damage was caused by the explosion of a mine which had been dropped in the dock some hours previously during an air raid. On the facts the defendants were found guilty of negligence, but they relied on the terms of the towage contract, which contained a proviso that the owners of the ship being towed agreed to "indemnify and hold harmless the port "authority against all claims in respect of . . . . damage . . . . "arising in the course of and in connexion with the towage . . . . "and whether such . . . . damage be caused or contributed to "by any negligence . . . . on the part of any officers or servants "whatsoever of the port authority":—

Held, that the damage did not arise "in connexion with the "towage"; and further that the proviso did not protect the defendants against claims by the owners of the vessel towed but only against third party claims.

Decision of Bucknill J. affirmed.

The Carlton [1931] P. 186, approved.

APPEAL from Bucknill J. (1).

Appeal by the defendants, a port authority, in an action of damage brought against them by the owners of the steamship *Lindenhall*. During an air raid a mine was dropped in a dock over which the defendants had jurisdiction and control. Some hours afterwards, while the *Lindenhall* was passing through the dock in tow of two of the defendants' tugs, the mine exploded and the vessel received damage. Bucknill J. held that the defendants were negligent in that they knew or ought to have known that the dock was not safe for the *Lindenhall* to navigate in, and took no steps either to remove the mine, to close the dock, or to warn the plaintiffs of the danger.

The defendants, however, also relied on the terms of the towage contract under which the *Lindenhall* was being towed. It provided, inter alia, that:—"The owners . . . . of the "ship . . . . so being towed or transported hereby agree and

(1) The case was heard in camera. The judgments, confined to the point of law, are published on the instructions and with the approval of the Lords Justices. —*Reporter*.

" undertake to indemnify and hold harmless the Port Authority " against all claims in respect of . . . . damage of any kind " whatsoever and howsoever or wheresoever arising in the " course of and in connexion with the towage or transport and " whether such . . . . damage be caused or contributed to " by any negligence default or error of judgment on the part of " any officers or servants whatsoever of the Port Authority " . . . . " Bucknill J., following *The Carlton* (1), held that this clause merely protected the defendants against third party claims, and not from claims made against them by the hirers of their tugs, and, further, that the damage claimed did not arise " in connexion with the towage."

Sellers K.C. and *Porges* for the defendants. *The Carlton* (1) put too narrow an interpretation on the towage clause. The port authority are " indemnified and held harmless " against " all claims " There is nothing to limit the protection to third party claims. An indemnity can refer to party and party claims : see *Portsmouth Steamship Co.* v. *Liverpool and Glasgow Salvage Association* (2) and *Lensen Shipping Co., Ld.* v. *Anglo-Soviet Shipping Co., Ld.* (3). [du Parcq L.J. : You have the words " indemnify against all consequences " in that case.] [MacKinnon L.J. referred to *Great Western Railway Co.* v. *J. Durnford & Sons* (4).] The damage arose " in connexion " with " as well as " in the course of " the towage. [Reference was also made to *Furness Shipbuilding Co., Ld.* v. *London & North Eastern Railway Co.* (5)..

Sir Robert Aske K.C. and *Owen Bateson* for the plaintiffs were not called on.

SCOTT L.J. dealt with the facts, on which he said negligence by the defendants was proved, and continued: The defendants contended that they were exonerated by a negligence clause in the contract of towage. Leaving out immaterial words, it runs thus : " The owner or owners . . . . of the vessel . . . . " being towed . . . . agree to indemnify and hold harmless " the Port Authority against all claims for or in respect of " loss of life, or injury to person or loss or damage of any kind " whatsoever and howsoever or wheresoever arising in the

(1) [1931] P. 186.
(2) (1929) 34 Ll. L. Rep. 459.
(3) (1935) 40 Com. Cas. 320.
(4) (1928) 33 Com. Cas. 251.
(5) (1934) 39 Com. Cas. 182.

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" course of and in connexion with the towage." Bucknill J. held that that clause did not entitle the defendant authority to claim absolution from liability for its negligence in the general management of the dock system. I agree with him. It is the same clause as was considered by Bateson J. in *The Carlton* (1). There the learned judge held, and in my opinion rightly held, (i.) that the clause was framed to protect the port authority from third party claims and not from claims made by the charterer of the tug, and (ii.) that the damage did not arise " in connexion with " the " towage or " transport." Here, also, I agree with Bucknill J. that the damage to the *Lindenhall* did not arise " in connexion with " her " towage or transport," for it was caused by negligence on the part of the port authority, and had nothing to do with the particular towage contract. I agree also with his view that the clause is limited to claims against the port authority by third parties, and does not touch claims by the owner of the towed vessel. Our decision on the first point is, however, enough to cover our judgment in the case. The appeal will be dismissed with costs.

MACKINNON L.J. : I agree, and I do not think it necessary to say more than that I agree entirely with every word of the most careful judgment of Bucknill J.

DU PARCQ L.J. : I also agree.

Appeal dismissed.

Solicitor for the defendants : *The Solicitor to the Port Authority.*

Solicitors for the plaintiffs : *Holman, Fenwick & Willan.*

(1) [1931] P. 186.

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Dec. 12, 13, 14, 15, 20.
Scott, MacKinnon and du Parcq L.JJ.

THE CHELDALE.

Shipping—Damages—Cargo owners' contribution to general average—Right to recover from ship in fault for collision—Remoteness.

The G.C. and the C. had been in collision, and the G.C. had had to put into port for repairs, and there discharge and re-load the cargo, whereby a general average expenditure was incurred. In an action between the owners of the two ships the G.C. was

held three-fourths to blame and the C. one-fourth. The plaintiffs, the owners of cargo on board the steamship G.C., subsequently brought an action against the defendants, the owners of the steamship C. claiming a proportion of a general average contribution for which the plaintiffs were liable to the owners of the G.C.

The defendants contended that on principle and authority a general average contribution was not recoverable against them :—

Held, affirming the decision of Lord Merriman P., that the liability of cargo owners to pay general average contribution towards special expenditure incurred by the carrying ship was a direct consequence of the collision, caused in part by the wrong doing of the other ship, and a head of damage, therefore, which was recoverable.

The Marpessa [1891] P. 403 overruled.

APPEAL from a decision of Lord Merriman P., confirming a report of the Admiralty registrar.

On February 19, 1940, a collision occurred between the steamship *Greystoke Castle* and the steamship *Cheldale*. As a result of the damage she sustained the *Greystoke Castle* had to put into Durban to effect repairs to enable her to complete her voyage to New York. In doing so she incurred general average expenditure to the amount, as ascertained by the general average statement, of 18,061*l.* 3*s.* 3*d.* An adjustment as between ship, freight and cargo showed the contribution towards that expenditure, due from her cargo, to be 3,235*l.* On February 23, 1940, the owners of the *Cheldale* started a collision action in the Admiralty Division against the *Greystoke Castle*, and in it the *Greystoke Castle* counterclaimed. On November 27, 1940, Bucknill J. held both ships to blame, the *Cheldale* for a quarter and the *Greystoke Castle* for three-quarters. On February 4, 1941, the owners of the *Greystoke Castle* started a limitation action and paid into court the whole amount of their 8*l.* a ton liability. On May 7, Langton J. decreed limitation. On July 4 the owners of the *Greystoke Castle* made their claim in the limitation proceedings for damage to their ship and also for the general average expenditure incurred by them, but did not in those proceedings, or in the collision proceedings, put forward any claim on behalf of cargo, or purport to be acting on behalf of cargo. Nor did the owners of cargo on the *Greystoke Castle* make any claim against the *Greystoke Castle* as the owners of that vessel were protected against any such claim by a negligence clause in the bills of lading. On July 24, 1941, the owners of cargo on the *Greystoke Castle* issued a writ against the owners of the

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Cheldale. On August 8, 1941, the owners of the *Cheldale* admitted liability subject to the limit of their quarter of the blame attaching to them for the collision.

The reference in the present action, brought by the owners of cargo on the *Greystoke Castle* against the *Cheldale*, came on for hearing in December, 1943. On the reference, the defendants, the owners of the *Cheldale*, contended that while they were liable for one quarter of the amount of the damages caused by the physical injury to the cargo, they were not liable to pay the sum for which the plaintiffs were liable to the owners of the *Greystoke Castle* in general average contribution. The registrar allowed the item and the defendants moved in objection to his report. Lord Merriman P. said that he would have thought it well nigh impossible to argue that the liability of cargo to pay general average contributions towards special expenditure by the carrying ship was not a consequence which might be reasonably expected, in the ordinary course of things, to flow from the wrong-doing of the other ship. But in *The Marpessa* (1) Sir Francis Jeune P. had laid down, as a matter of principle, that the loss sustained by the ship in having to make a general average contribution in respect of a jettison of part of the cargo was not caused by the collision. It was, he said, " an instance " of the old distinction between causa causans and causa sine " qua non." He (Lord Merriman) was not convinced by the reasoning on which that decision was based, although he might have felt obliged to follow it if it had stood unquestioned, but in his opinion it was an essential step in the reasoning on which the judgments of the Court of Appeal in *The Minnetonka* (2) were based that a general average contribution was an admissible head of damage. He thought, therefore, that he was entitled to refuse to follow The *Marpessa* (1). He held, accordingly, that a general average contribution was recoverable as such against the wrong-doing ship, and that the registrar's report should be confirmed. The defendants appealed.

Sellers K.C. and *Owen Bateson* for the defendants. It is admitted that the cargo owners can recover from the defendants the actual physical loss sustained by the cargo, but a general average contribution as such, which includes the cost of preparing an elaborate general average statement, is too

(1) [1891] P. 403. (2) [1905] P. 206.

remote. Sir Francis Jeune's decision in *The Marpessa* (1) correctly lays down the practice which has always prevailed, and it should be supported : see Roscoe's Measure of Damages, 3rd ed., p. 18, and *The Toward* (2). *The Minnetonka* (3) relied on by the registrar and the President, was a compromise case and does not purport to overrule *The Marpessa* (1). The decision of the United States Supreme Court in *The Sucarseco* (4) that a general average contribution is recoverable as damages against the wrongdoer was based on the Jason clause, and is not the law of this country.

Sir Robert Aske K.C. and *A. J. Hodgson* for the plaintiffs. The cargo owners have in fact paid to the owners of the *Greystoke Castle* the amount of the general average contribution due from the cargo, and are entitled to one quarter of that amount from the owners of the *Cheldale* as damages which directly flow from the collision. *The Marpessa* (1) was wrongly decided. [They were stopped.]

Sellers K.C. replied.

Cur. adv. vult.

1944. Dec. 20. The following judgments were read :—

SCOTT L.J. : This appeal by the owners of the *Cheldale* raises one issue of general principle, namely, whether when general average expenditure is incurred by the master of ship A, to save the adventure from imminent danger caused by the negligence of ship B, the owners of cargo on ship A have a right of action against ship B to recover the amount of their general average contribution. I have no doubt that they have, but the contrary was decided in the Admiralty Division in *The Marpessa* (1), and it is contended by the defendants that a practice in the Admiralty registry conforming to that decision, which has been followed for half a century, ought to be regarded as settled law. I do not think so. I have stated the issue in terms of the wrong-doing ship being alone to blame, because that is the necessary assumption to test the question of law. In the present case both were held to blame, but that is irrelevant. The cargo carrying ship also limited her liability, but that, too, is irrelevant.

The Marpessa (1) was in my opinion wrongly decided. To say that general average disbursements, whether primary by

(1) [1891] P. 403.
(2) (1899) Shipping Gazette, May 8.
(3) [1905] P. 206.
(4) (1935) 51 Ll. L. Rep. 238, 241.

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the innocent ship, or secondary by way of contribution to the primary sufferer from the other general average parties, are not the direct consequence of the negligence of the wrong-doing ship (which was the ratio decidendi in that case) is contrary to the fundamental principle of causation in our law of torts. The common law of the sea in regard to general average imposes the duty to disburse on the master of the ship, and equally imposes the duty to contribute on the other parties to the adventure, whenever an event causes danger of loss to the whole adventure. The collision was such an event, and the legal obligation to contribute towards the sacrifice or expenditure required to save the adventure attaches to all interests alike as a direct consequence of the danger. That the *Greystoke Castle* was three-quarters to blame is irrelevant to principle—it only affects the amount. I am not satisfied that in the *Minnetonka* (1) the Court of Appeal was really dealing with the principle which the *Marpessa* (2) judgment sought to enunciate, and I therefore disregard what was said there; but otherwise I agree entirely with the learned President's judgment in the present case, which confirmed the excellent report of Mr. Registrar Darby K.C. The *Cheldale* is plainly liable to the owners of the cargo for that fraction of their contributions which is represented by the degree of fault for the collision attributable to the *Cheldale* under the judgment of Bucknill J. We are not asked to go into any question of figures, and the decree of the learned President should stand. The appeal must be dismissed with costs.

MACKINNON L.J. It is argued, on the authority of *The Marpessa* (2), that a claim for damages based on the liability imposed on the claimant towards a third party by the express or implied terms of the contract between the claimant and the third party (for example, shipowner's liability for damage to his cargo, or liability of cargo-owner for general average contribution towards expenses paid by the shipowner) must be disallowed. It is said that such damages are too remote. I think this proposition is erroneous, and that *The Marpessa* (2) was wrongly decided as a matter of principle. Manifestly in a claim against a tort-feasor, for example, one who has negligently damaged his neighbour's premises by fire, the neighbour can claim as part of his damages the amount of his liability to a third party—for example, the owner of goods

(1) [1905] P. 206. (2) [1891] P. 403.

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which he was storing without an exception of damage by fire. A tort-feasor who happens to be a shipowner is liable to the common law liability of a tort-feasor, and cannot be in any privileged position. In the result, I think the so-called principle of *The Marpessa* (1) is entirely wrong.

DU PARCQ L.J. I agree that the appeal should be dismissed.

Solicitors for defendants: *Botterell & Roche, for Ingledew, Mather & Dickinson, Newcastle-on-Tyne.*
Solicitors for plaintiffs: *Thomas Cooper & Co.*

(1) [1891] P. 403.

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Nov. 30; *Dec.* 1, 4, 20.
Lord Greene M.R., MacKinnon and du Parcq L.JJ.

Divorce—Practice—Submission of no case—Duty of judge to put counsel to election whether to call evidence—In default counsel entitled to call evidence—Evidence of respondent and co-respondent accepted by judge on their demeanour—Right of appellate court to reverse decision.

If at the close of the petitioner's case counsel for the respondent submits that there is no case, it is for the judge to put counsel to his election whether he will call evidence, and it is only if counsel elects not to do so that the judge must decide whether or not the petitioner has established his case.

Alexander v. *Rayson* [1936] 1 K. B. 169, *Parry* v. *Aluminium Corporation, Ld.* [1940] W. N. 44 and *Laurie* v. *Raglan Building Co.* [1942] 1 K. B. 152, applied.

But if through oversight or misapprehension the judge rules against the submission without having put counsel to his election, counsel may call evidence just as if he had not made the submission.

Where a judge has accepted the evidence of a witness or witnesses on one side of a case on a careful observation of his or their demeanour, and has given judgment accordingly, an appellate court can reverse the decision, but only in the rarest cases, and when it is convinced by the plainest considerations that it is justified in holding that the judge has formed a wrong opinion.

Hvalfangerselskapet Polaris A/S. v. *Unilever, Ld. and Others* (1933) 46 Ll. L. Rep. 29, applied.

APPEAL from Wallington J.

On September 16, 1932, Cecil Mortley Yuill (hereinafter

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called the petitioner) married Annie Elizabeth Sisson (hereinafter called the respondent). Between March and early in September, 1942, the respondent committed adultery on several occasions with Edward Grieves (hereinafter called the co-respondent) but these acts were condoned by the petitioner at about the middle of September, 1942, the respondent then promising to have no more to do with the co-respondent. In fact, however, the respondent tried to see the co-respondent, and on September 3, 1943, the petitioner petitioned for dissolution of the marriage on the ground that the respondent had committed adultery with the co-respondent on August 4, 1943, in his motor lorry near a plantation at Morton Hardwick, in the County of Durham. The respondent and co-respondent denied that they were guilty of adultery on this date. Evidence was given at the hearing by the petitioner and one Young that from a position some distance from the lorry they saw acts of the respondent and co-respondent, followed by their disappearance from sight in the front of the lorry, which indicated that adultery had been committed. At the close of the petitioner's case, counsel for the respondent submitted that there was no case, but Wallington J. did not accept this submission, and allowed counsel for the respondent to call evidence. The respondent and co-respondent gave evidence denying that adultery had been committed. Wallington J. refused to accept the contention that counsel for the respondent by submitting that there was no case had lost the right to call evidence and on the facts expressed his doubt whether the petitioner and Young could have seen what they alleged. He believed the evidence of the respondent and co-respondent, basing his belief upon a careful study of their demeanour, although he said that much of their evidence, especially that of the respondent, was given in a very unsatisfactory way. He therefore dismissed the petition. The petitioner appealed.

There were only two points calling for report (1.) whether Wallington J. ought to have allowed counsel for the respondent to call evidence, having regard to his submission that there was no case for the petition, and (2.) whether the Court of Appeal could reverse Wallington J.'s decision and accept the evidence of the petitioner and Young, and refuse to accept that of the respondent and co-respondent.

Grazebrook K.C. and *W. Latey* for the petitioner. As counsel for the respondent submitted that there was no case,

Wallington J. ought not to have allowed him to call evidence : *Alexander* v. *Rayson* (1) and *Parry* v. *Aluminium Corporation* (2). Counsel for the respondent must be taken to have elected to call no evidence, and judgment ought to have been given for the petitioner. The Appeal Court ought so to hold, and to grant a decree nisi in favour of the petitioner. Alternatively, the court ought, in considering this appeal, to ignore the evidence given on behalf of the respondent. [Counsel then proceeded to argue the appeal on the evidence.]

P. L. E. Rawlins and *Horace Vester* for the respondent. [LORD GREENE M.R. We need not trouble you as to the effect of the submission of no case.] The Court of Appeal is not at liberty to reverse Wallington J.'s judgment in view of his having accepted the evidence of the respondent and co-respondent on their demeanour: see *S.S. Hontestroom* v. *S.S. Sagaporack* (3) which shows exactly what the Court of Appeal should consider in dealing with the trial judge's decision on a question of fact and how material it is that the judge has seen and heard the witnesses and been influenced by their demeanour. It is contended that the judge was entitled to find as he did about the incident in the lorry and that this court must dismiss the appeal.

Grazebrook K.C. replied.

Cur. adv. vult.

Dec. 20. LORD GREENE M.R. read the following judgment. Before I come to the principal question in this case it will be convenient to dispose of an argument submitted by counsel for the petitioner. In the court below, when his case was closed, counsel for the respondent made a submission of no case—not, as I understand, in the sense that the evidence led by the petitioner was insufficient in law to support a decision in his favour, but by way of an invitation to the learned judge to dismiss the petition without calling on the respondent. Wallington J. did not at the time appreciate the nature of counsel's submission. In particular it did not occur to him that in taking the course which he did the respondent's counsel was in any way intending to call no evidence. In the result he did not follow the practice which, we are informed, has been adopted in the Divorce Division, of calling on the respondent's

(1) [1936] 1 K. B. 169.
(2) [1940] W. N. 44.
(3) [1927] A. C. 37, 47.

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counsel to elect whether to call evidence or to proceed with his submission. The submission having failed, counsel for the petitioner contended before Wallington J. that the respondent's counsel, by making the submission, had lost his right to call evidence and that the judge's ruling necessarily meant that the petitioner was entitled to a decree. This contention was rejected by Wallington J. It was, however, repeated before us and we were invited to say that the petitioner ought in the circumstances to have been granted a decree as a matter of course, and to allow the appeal accordingly. Alternatively, it was said that if the mere fact that the judge had ruled against the submission of no case was insufficient, we ought in considering the facts to disregard the evidence led by the respondent. This argument is, in our opinion, based on a misapprehension of the meaning of the practice which, in appropriate cases, is followed where counsel for a defendant desires to make a submission of no case. The practice is discussed in *Alexander* v. *Rayson* (1), *Parry* v. *Aluminium Corporation, Ld.* (2) and *Laurie* v. *Raglan Building Co.* (3), and I will assume that it is a proper practice to follow in the Divorce Division. It does not mean that counsel by submitting no case ipso facto loses his right to call evidence if his submission fails. He only loses that right if he definitely elects to call no evidence. He may make this election expressly or (as in *Laurie* v. *Raglan Building Co.* (3) impliedly. The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election, and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound : but if for any reason, be it through oversight or (as here) through a misapprehension as to the nature of counsel's argument, the judge does not put counsel to his election, and no election in fact takes place, counsel is entitled to call his evidence just as if he had never made the submission. This argument therefore fails.

I now come to the principal question in the case, which is one of pure fact, namely, did the respondent commit adultery with the co-respondent in the co-respondent's lorry on August 3, 1943 ? [His Lordship then made a careful consideration of the evidence on both sides and continued :] From a careful perusal of the whole of the respondent's evidence

(1) [1936] 1 K. B. 169.
(2) [1940] W. N. 44.
(3) [1942] 1 K. B. 152.

I have come to the conclusion that she was deliberately seeking out the co-respondent with the intention of renewing her previous relations with him, and that in pursuance of this design she brought about the meeting of August 3, and that with regard to that meeting the evidence of the petitioner and Mr. Young ought to be accepted, and that of the respondent and co-respondent rejected.

But it is said that we are not entitled to take this view because the learned judge believed the evidence of the respondent and the co-respondent, and based his belief, as he said, on a careful observation of their demeanour and the opinion which he formed of their "type and characteristics." He said that much of their evidence—particularly that of the respondent—was given in a very unsatisfactory manner, and that the respondent was on some occasions resentful, and consequently reckless in her answers. Both of them, he said, were affected by nervousness and embarrassment and he was "not satisfied that they were deliberately dishonest in the "box." He was, however, satisfied, despite his serious criticism, that they were substantially truthful in their testimony on the vital matters which he mentioned.

We were reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part on his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, albeit rarely, be deceived by a clever liar, or led to form an unfavourable opinion of an honest witness, and may express his view that his demeanour was excellent or bad as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in

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question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value.

There is one further consideration which is particularly relevant to the present case. A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge from what it is when he is being questioned by counsel, particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue. That it is open to an appellate court to find that the view of the trial judge as to the demeanour of a witness was ill-founded has indeed been recognized by the House of Lords itself. The case to which I refer was one in which I was engaged as counsel in the Court of Appeal and in the House of Lords, and I think it right to place the matter on record as the only report of the case does not bring out the relevant circumstances. The case is that of *Hvalfangerselskapet Polaris A/S* v. *Unilever, Ld. and Others* (1). In one respect it resembles the present case, since the learned trial judge had himself taken a most active part in the examination of the witnesses. As appears from the printed record, he expressed the following opinion with regard to two of them. "It is "necessary for me, in view of this contradiction, to decide "which evidence to accept. I have already expressed my "opinion as to the reliability of Mr. Blom as a witness. I did "not form anything like so good an opinion of either Mr. Young "or Mr. Bjelke. Their evidence and the manner in which they "gave it were both unconvincing . . . . Mr. Bjelke, who was "called to corroborate Mr. Young's evidence as to his second "conversation with Mr. Blom, says nothing of any com-

(1) (1933) 46 Ll. L. Rep. 29.

" munication by Young to Blom of Young's controlling interest " in the Polaris Company. Finally, these alleged communica- " tions of his interest do not fit into his story. I think they " were invented on the spur of the moment where it appeared " important to show that Mr. Blom must have known for " certain that the Polaris Company would want to use a " tanker.". When the case came to the Court of Appeal, Scrutton L.J., who delivered the leading judgment, said : " As to this last allegation, the judge below having seen the " witnesses and heard the conflicting evidence, declines to " accept Mr. Young's version. It is impossible for this court " to interfere with this finding."

There were two issues in the case, one of construction and one a claim to rectification. It was on the latter issue that the evidence in question was relevant, and although in the House of Lords the appeal was ultimately decided on the issue of construction, the issue of rectification was fully argued and the whole of the evidence examined in the greatest detail. In the result the House was satisfied by this examination that the strictures passed by the trial judge on the two witnesses in question were unjustified and that their evidence was truthful. The following passages are to be found in the speeches : " Similarly, Mr. Blom failed to recollect a telephone " conversation on February 10, 1930, testified to by Mr. Young, " in which he was corroborated by the bank clerk, Mr. Bjelke. " The conversation is entirely consistent with the probabilities " and the business conditions proved to be in existence at the " time. Mr. Blom's version of a conversation at a later date " in March is not. I cannot see that Mr. Blom's recollection " affords any ground for distrusting the evidence of either " Mr. Young or Mr. Bjelke. The result produced on my mind " is that there is no satisfactory reason shown for any " imputation on the substantial accuracy or good faith of any " of the witnesses called by the plaintiffs," per Lord Atkin (who presided) (1). The next quotation is this : " In this " view of construction the claim of the appellants to rectifica- " tion does not arise, and it is unnecessary to discuss the " question whether or not the findings of fact arrived at by " Branson J., and not set aside by the Court of Appeal, were " correct or not. I desire to say, however, that having since " the hearing re-perused the material evidence, I entirely " concur with the remarks on this point contained in the

(1) (1933) 46 Ll. L. Rep. 36.

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" opinion of my noble and learned friend on the woolsack, " which I have had the opportunity of reading," per Lord Warrington (1). " I concur with the motion proposed, but " I desire to add this, that having carefully studied the short- " hand notes of the evidence I can find therein no trace of any " matter or thing which would justify the view that the " evidence given by the witnesses on behalf of the appellants " was otherwise than truthful and accurate," per Lord Russell of Killowen (2). " Indeed, Mr. Young (who, I am convinced, " was a fair and candid witness, though subjected to severe " and not quite merited cross-examination) had in fact " contracted on February 8, 1930, to purchase from British " shipbuilders for 146,000*l.* a tanker, which he intended to " have transferred to the Polaris Company (in which he " controlled a majority of shares), for use in the season. I also " desire to express my concurrence in what has been observed " by my noble and learned friend Lord Atkin in regard to the " accuracy and good faith of the appellants' witnesses," per Lord Wright (3).

That case shows how important it is that the judge's impression on the subject of demeanour should be carefully checked by a critical examination of the whole of the evidence. If there the trial judge had done this, as it was done in the House of Lords, he could not have expressed the opinion which he did as to the demeanour of the witnesses.

In the present case, too, the learned judge cannot, I think, have subjected the evidence to an adequate scrutiny before expressing the view which he did as to the demeanour of the respondent and the co-respondent. [His Lordship then referred to other evidence given in the present case and said :] I conclude by referring to the fact that the respondent in giving her evidence was quite clearly on many occasions fencing with the questions put to her. She was rebuked many times by the learned judge for doing this, as appears on the shorthand note of the evidence but not on the learned judge's own note. We were informed by counsel that the learned judge was not furnished with a transcript of the shorthand note so that when considering his judgment he had nothing before him to remind him of what he had said and of how often he said it. When the questions and answers are read together the clear impression left on my mind is that the

(1) (1933) 46 Ll. L. Rep. 40.
(2) Ibid. 42.
(3) Ibid. 48.

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respondent was doing her best to avoid answering the questions put to her, an impression which the answers read apart from the questions could not have produced. The only remaining question relates to the discretion of the court which the petitioner asks to have exercised in his favour. If Wallington J. had thought that the petitioner had proved his case he would, as he said, have been disposed to accede to this request. I have considered the circumstances and the discretion statement and I think that the view which the learned judge was disposed to take on this matter was a proper one. There will be a decree nisi, with costs against the co-respondent. The decree will be dated as of September 5 last.

I should add that MACKINNON L.J. has read this judgment and agrees with it.

DU PARCQ L.J.: I also agree with the judgment which has been delivered. I could not state my own reasons without repeating what has been said by the Master of the Rolls, with which I am in complete agreement.

Appeal allowed.

Solicitors: *Sayer, Ledgard & Smith, for Newby, Robson & Cadle, Stockton-on-Tees; Isadore Goldman & Son, for A. N. Levinson, West Hartlepool.*

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Lord Goddard, MacKinnon and du Parcq L.JJ.

Husband and wife—Divorce—Inquiry as to ownership of chattels—Decree absolute—Continuation of inquiry—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 17.

An inquiry ordered on a summons under s. 17 of the Married Women's Property Act, 1882, as to the ownership of chattels, can be continued notwithstanding the dissolution of the marriage by decree absolute.

APPEAL from Denning J.

A wife petitioner obtained a decree nisi of divorce on May 14, 1943. On May 31, 1943, the respondent issued a summons

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under s. 17 of the Married Women's Property Act, 1882 (1), to determine the ownership of certain furniture. On June 28, 1943, Hodson J. ordered an inquiry, and referred the matter to a registrar. Neither side asked for an appointment to hold the inquiry, and on March 14, 1944, the decree was made absolute on the respondent's application, the petitioner not having applied. The respondent having some time later sought to proceed with the inquiry ordered by Hodson J., the registrar was of opinion that the parties having ceased to be husband and wife, there was no jurisdiction to proceed with the inquiry.

Denning J. on February 19, 1945, reversed the registrar's order, and directed that the inquiry should proceed. The petitioner appealed.

Fairweather for the petitioner. It is clear from the opening words of s. 17 that it is only applicable to questions between husband and wife. If the marital status has been determined, the procedure under the section is no longer applicable. The respondent made no attempt to get the inquiry held under Hodson J.'s order while the marriage was still subsisting : he cannot do so now, but must rely on his remedy, if any, at law. [He cited *Joseph orse. King* v. *Joseph* (2), in which an order was made after a decree absolute of nullity, but the point does not appear to have been raised.] No reasons are given for the judgment confirming the registrar's report.

W. Harvey Moore for the respondent. I concede that proceedings under s. 17 could not be begun after decree absolute : but if they have been properly started during the marriage, they do not abate by reason of a decree absolute being pronounced. Actio curiæ neminem gravabit—and it might cause serious hardship if the inquiry could be rendered abortive in this way. It is to be observed that it is not only the spouses who may apply under the section. A sort of

(1) Married Women's Property Act, 1882, s. 17 : " In any question " between husband and wife as to " the title to or possession of " property, either party, or any " such bank, corporation, com- " pany, public body or society as " aforesaid in whose books any " stocks, funds, or shares of either " party are standing, may apply " by summons or otherwise in a " summary way to any judge of " the High Court . . . . and the " judge . . . . may make such order " with respect to the property in " dispute, ... or may direct " . . . . any inquiry touching the " matters in question to be made " in such manner as he shall think " fit."

(2) [1909] P. 217.

interpleader procedure is made available for other persons who may be uncertain which spouse is entitled to property in their possession. It would be disastrous if, when the inquiry was on the point of completion, all the costs were thrown away because the decree was made absolute. The court having ordered an inquiry will not stultify itself by not allowing its order to be carried out.

LORD GODDARD : In my opinion, after careful consideration of this matter (which at first sight is not easy, and as to which there is no authority), this appeal fails. It is a very technical matter, and certainly considerations of convenience are in favour of allowing the inquiry to proceed and the matter to be dealt with under s. 17 if there is power to do so. It is therefore necessary to see exactly what s. 17 provides. [His Lordship read it.] The judge can make an order at once when the application is made, or he can make an order as the result of an inquiry. In the King's Bench Division if an inquiry is ordered it is held before a master, who now has power to make an order himself, though formerly, until the rules were altered, he could only make a report, and the court itself had to make the order. In the Divorce Division it seems that the judge himself still makes the order on the registrar's report if an inquiry is directed to be held by him.

It seems to me that the answer to the problem is this. If the parties are husband and wife when the question arises, either can apply to the court, and the court can, if it sees fit, order an inquiry. These questions are quite independent of any action. For instance, if a simple dispute arises between a husband and wife the matter is begun by an originating summons in the King's Bench or Chancery Division as the parties may choose. It seems also that where there is a divorce suit pending they can apply in the Divorce Division. If at the time when they apply the parties are husband and wife, as they were in this case, then the court has power under the section either to make an order at once or to direct an inquiry. If it directs an inquiry, I do not see that there is anything which forces us to say that that inquiry must come to a standstill if a decree absolute intervenes. The inquiry is on foot, it can be carried out. If, when it has taken place, the parties come back to the court to ask for an order, the court would no doubt have to take into account, according to the nature of the report, the fact that there had been a dissolution of the marriage by the decree absolute. I can well understand

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that a judge might say: "The registrar's report is a very "proper one on the basis that the relation of husband and "wife subsists: but since that relation has now come to an "end, I must vary the order which he proposes."

As everybody knows, it is often difficult to decide questions of property between husband and wife according to their strict rights. The matter very often comes up with regard to wedding presents, which in one sense are given to both spouses. One often has to solve the problem by saying that if a present was given by a friend or relation of the wife's, the property should be given to the wife, and that it should be given to the husband if it was a present from a friend or relation of his. I do not see that it would make any difference if there had been a decree absolute. It is difficult, for instance, to visualize any case in which the title to money in the bank could be affected by the question whether there had or had not been a decree absolute. I can see that if there has been a decree absolute between the order directing the inquiry and the report, on the report coming before the court the court might refuse altogether to make an order. There is nothing to compel it to do so, and it might say that, in the circumstances, it would leave the parties to their remedy at law. On the other hand, as the court had jurisdiction to act under the section when the application was made, it must have power to carry the matter to a conclusion. That seems to have been the view of Denning J., and I think it is the right view. The court had power, on the husband's application while the marriage still subsisted, to direct this inquiry. The inquiry can go on, and when it is finished the case can go before the judge, who will then, of course, if there are matters which call for it, take into account the fact that there has been a decree absolute, which may or may not have some bearing on the decision which he ultimately gives. For those reasons I think the appeal fails and should be dismissed, but in all the circumstances of the case the court does not see fit to make any order as regards the costs of the appeal.

MACKINNON L.J. I agree.

DU PARCQ L.J. I agree.

Appeal dismissed.

Solicitor for petitioner: *John B. de Fonblanque.*
Solicitors for respondent: *Kenneth Brown, Baker, Baker.*

J. W. H.

AINLEY *v.* AINLEY.

1944
Dec. 14.
1945
Jan. 16.
Barnard J.

Divorce—Condonation of adultery—"Matrimonial Offence"—Whether subsequent desertion of less than three years revives condoned offence—Matrimonial Causes Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2 (*b*).

On an undefended petition for divorce on the ground of the respondent's adultery the petitioning wife sought to revive condoned adultery by subsequent desertion of less than three years duration :—

Held, that condoned adultery can only be revived by subsequent matrimonial offence sufficient in itself to be a ground for divorce or judicial separation, and that desertion must therefore be for at least three years prior to the presentation of the petition as prescribed by the Matrimonial Causes Act, 1937. *Higgins* v. *Higgins* [1943] P. 58, not followed.

UNDEFENDED PETITION for divorce.

By her petition, which was heard at Leeds Assizes on December 14, 1944, the wife sought the dissolution of her marriage on the ground of the husband's adultery. The parties were married on April 19, 1922, and in the year 1934 the wife discovered that the husband had committed adultery. She forgave him, and the parties lived together until September 2, 1942. She then finally left him in circumstances which constituted him a deserter. On August 31, 1942, the wife had discovered a letter, purporting to come from a woman signing herself "Winnie," in her husband's possession. She spoke to her husband about this letter, and he told her that it was not intended for him. He made no effort to persuade his wife to return to him, nor had he in any way supported her. On June 30, 1943, at a court of summary jurisdiction, the wife obtained a maintenance order against the husband on the ground of his desertion. The wife's petition alleged against the husband adultery which had been condoned, and also adultery on August 31, 1942, which, however, was not proved to the satisfaction of the court. The wife relied on the husband's desertion as reviving the condoned adultery.

Petrie and *McLusky* for petitioner.

Cur. adv. vult.

1945. Jan. 16. BARNARD J. read the following judgment in which, after stating the facts he continued : The question

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which I have to decide is whether desertion of insufficient duration to be a ground for a decree is none the less sufficient to revive condoned adultery. Counsel referred me to a decision of Pilcher J. in *Higgins* v. *Higgins* (1), in which following some obiter dicta of Lord Merriman P., in *Jordan* v. *Jordan* (2), he held that desertion independently of its duration, revived condoned adultery. I assume that Pilcher J. based his decision on the following passage in *Jordan* v. *Jordan* (3): "It seems to me to be equally clear that the "offence exists under the Act of 1937 independently of its "duration." Reluctantly I find myself unable to agree with Pilcher J.'s decision. It seems to me that it would of necessity follow from this decision that a husband who committed adultery, was forgiven by his wife, and then some twenty years later left his wife after a quarrel, could be divorced by her; the desertion for a period of a few days' duration would have revived the condoned adultery. Moreover, this might happen in spite of the fact that the husband was repentant and genuinely willing to return to her, for he might be forestalled from telling her so, and thus terminating the desertion, by the prompt filing of her petition, whereas a maintenance order could be discharged on proof of the above facts. I cannot believe that this is the law, and in coming to this conclusion I have also considered some of the older authorities.

A great deal of confusion has arisen from the expression "matrimonial offence," but, in my opinion, the decision in *Palmer* v. *Palmer* (4), three years after the passing of the Matrimonial Causes Act, 1857, makes it quite clear that a matrimonial offence, which might have been the foundation of a sentence in a matrimonial court, and which has been condoned, could only be revived by a subsequent offence which might itself have been a ground of a sentence of divorce a mensa et thoro. Further, in the year 1903 Sir Francis Jeune, P., held in *Houghton* v. *Houghton* (5), which was a wife's suit for a divorce, that the condoned adultery of a husband was revived by his subsequent desertion for two years and upwards without reasonable excuse. Counsel for the wife, in the case now before me, argued logically that in *Houghton* v. *Houghton* (5) the wife had to establish desertion for two years and upwards to enable her, together with the adultery thereby revived, to

(1) [1943] P. 58.
(2) [1939] P. 239.
(3) Ibid. p. 251.
(4) (1860) 2 Sw. & Tr. 61.
(5) [1903] P. 150.

obtain a decree of divorce. But Gorell Barnes J. in *Copsey* v. *Copsey* (1), which was a husband's suit for divorce, followed *Houghton* v. *Houghton* (2) and decided that a wife's condoned adultery was revived by her subsequent desertion for two years and upwards without reasonable excuse. The husband in that case only needed the revived adultery to entitle him to a divorce, but none the less the judge seems to have considered that the spouses were on an equal footing as regards the revival of a condoned matrimonial offence, and that the husband had to establish desertion for two years and upwards in order to revive his wife's condoned adultery.

From the above authorities the law seems to me to be clear that a matrimonial offence which is a ground for a decree of judicial separation or divorce, and which is condoned, can only be revived by a matrimonial offence which is also a ground for a decree of judicial separation or divorce, and I do not consider that it makes any difference that desertion, to provide such a ground, now has to be of three years' duration and continuing up to the presentation of the petition instead of for the period of two years and upwards, as it was before the Matrimonial Causes Act, 1937. I am fortified in that view of the law by what Viscount Simon L.C. said in his speech in *Henderson* v. *Henderson* (3): "... if the spouse who had "been forgiven past matrimonial offences is proved to commit "a further matrimonial offence in the future, then the past "offences are revived and become available as further ground "for a divorce." The words "further ground for a divorce" seem to me to indicate that the reviving matrimonial offence must of itself be a ground for a decree.

Owing to the extension of the grounds for divorce by the Matrimonial Causes Act, 1937, the doctrine of revival has lost much of its importance, but condoned adultery, for instance, can still be revived by failure to comply with a decree for restitution of conjugal rights; such failure to comply being a ground for a decree for judicial separation.

Therefore this petition fails and must be dismissed.

Solicitors: *Jaques & Co., for Moore, Shepherd & Whitley, Halifax.*

(1) [1905] P. 94.
(2) [1903] P. 150.
(3) [1944] A. C. 49, 54.

V. J. M. S.

Glenister v. *Glenister* - - [1945] P. 30
Considered. BEER *v.* BEER (NEILSON CITED) - - **Willmer J. 10**
Affirmed. GOSS *v.* GOSS
[1948] P. 15

pplied. EVERITT *v.* EVERITT.
949] 1 All E.R. 908.

Applied. EVERITT *v.* EVERITT. **[1949] P. 374**

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Jan. 23.

Lord Merriman P. and Pilcher J.

GLENISTER, A. *v.* GLENISTER, C.

Justices—Husband and wife—Separation order—Desertion alleged by wife—Husband's defence of adultery by wife not proved—Conduct of wife—Husband's reasonable cause for withdrawing from cohabitation—Child born out of period of gestation—Evidence of non-access—Admissibility.

Although a husband may not be able to prove by admissible evidence that his wife has committed adultery, yet, if the conduct of the wife has been such as to create in the mind of the husband a reasonable belief that she has been guilty of a matrimonial offence, he has a sufficient defence to proceedings based on desertion.

Haswell v. *Haswell* (1859) 1 Sw. & Tr. 502, and *Ousey* v. *Ousey* (1874) L. R., 3 P. & D. 223, followed.

Per Pilcher J. Evidence of non-access although inadmissible for the purpose of proving adultery may nevertheless be admissible to prove the state of mind of the husband and the reasonableness of his belief in the wife's misconduct.

APPEAL by the husband from a decision of the North London Police Court magistrate, granting the wife a judicial separation on the ground of the husband's desertion.

The following facts are taken from the judgment of the President. At the time of the wife's application for a separation order the parties had been married about six years, and there was one child of the marriage. The husband, who was serving in H.M.'s forces and at all material times was serving in England, had ten days leave between July 10 and 20, 1943, and spent it at home with his wife. During that period intercourse admittedly took place. The day after his return to his unit he reported sick with gonorrhea. He reported that fact by letters both to his wife's parents and to his wife, and admittedly made it clear that he was accusing his wife of having infected him. On October 17, 1943, the husband came home in the early hours of the morning and found three men in the house, one of whom, the wife subsequently admitted, was in her bedroom. The husband was denied admission to the home until the morning, when he took away the child of the marriage and from that date, according to his evidence, never resumed cohabitation. No explanation in detail was then given by the wife to the husband of the presence in the home of the three men. In January, 1944, the husband discovered that his wife was three months pregnant, and he thereupon turned her out of the house and made it clear that he had broken up the

matrimonial home irrevocably. On July 30, 1944, the wife gave birth to a child.

In the police court evidence was given by the husband, whose defence was the adultery of the wife, that sexual intercourse between them last took place in July, 1943. This, in terms, was confirmed by the wife, who nevertheless denied adultery and declared the husband to be the father of the child. Her explanation of the presence of the three men in the home on the night of October 17 was that they were hiding from justice.

The learned magistrate found that the wife had not committed adultery and on the ground that it was impossible on the evidence to determine which of the spouses had infected the other with venereal disease, he held that the husband had failed to prove his defence, justifying desertion of his wife. He therefore granted the wife a separation order. The husband appealed.

Elliot Gorst for the husband.
D. Henderson (for *W. H. Evans*, on War Service) for the wife.

LORD MERRIMAN P. This is an appeal from Mr. Blake Odgers, sitting at the North London Police Court. It is an appeal by a husband, against whom the learned magistrate has made a finding of desertion. The case was one in which, admittedly, the husband had withdrawn from cohabitation, and in which he was asserting that he had reasonable grounds for so doing. The learned magistrate, who tried this case most patiently and carefully, obviously felt very grave doubt about it, and we are told that he has actively encouraged this appeal. I am bound to say that I am in full agreement with the learned magistrate with regard to the difficulties of the case, and fully understand the anxiety which it must have given him. The question is whether it is possible or right for us to interfere with his final conclusion that the husband had not made out any reasonable cause for withdrawing from cohabitation, and, therefore, was a deserter.

The case presented by the husband, in substance, was that his wife had committed adultery. He did not, as I see it, in so many words put forward the issue which, after very helpful argument on both sides, we have come to the conclusion is really the ultimate issue in this case, that whether the wife had committed adultery or not she had so conducted herself as to

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give him every ground for supposing that she was misconducting herself with men, and had, in fact, committed adultery, and that this, whether adultery was ultimately proved, or not, justified him in withdrawing from cohabitation. As I read the very careful note of the evidence on the one side and on the other (and, let me add, the only two witnesses called were the two parties), the issue was presented by the husband and his advocate on the basis that the wife had been guilty of adultery. [His Lordship then referred to the facts and the evidence on which the husband based his belief in the wife's adultery and continued :] According to the evidence, which was clearly admissible for certain purposes (it was admissible from the point of view, of course, of rebutting any question of condonation), the husband said that he had not had intercourse with his wife after July, 1943, until they parted. My authority for saying that the evidence must be admissible on the question of condonation is in the opinion of Lord Dunedin in *Russell* v. *Russell* (1). It is also common ground that on at least one occasion, which is variously stated to be in August or in September (and it may be that there were two such visits), he did visit the matrimonial home, and I ought to say in that connexion that though ambiguous phrases such as " lived " together " and " lived as man and wife " and so forth appear on the face of the note, phrases which we have only too good reason here to know are often used in an ambiguous sense, the wife herself on at least one occasion also stated categorically that there had been no sexual intercourse between them after July, 1943. It is clear, therefore, that as it was admitted that the husband had resided under the matrimonial roof after this episode in connexion with the venereal disease, the question of condonation had to be cleared up by the court, even if it was not raised by the wife, and, as I have said, I think it is indisputable that the evidence as to the termination of sexual intercourse was admissible for that purpose, but not, as I shall show in a moment, for another purpose.

[His Lordship then dealt with the episode of October 17, when the husband found three men in the matrimonial home and one of them in the wife's bedroom, and with her failure to give the husband any detailed explanation, and proceeded :] On that part of the case the learned magistrate, who saw the witnesses whom we have not seen, accepted the wife's story that she had not committed adultery, and, I presume, therefore,

(1) [1924] A. C. 687 at 728, 729.

accepted her story that these men had only come in as refugees from the police, and were not there in the circumstances which the husband obviously suspected. It goes without saying that on the issue of adultery, these facts, taken by themselves, could clearly afford sufficient proof had the magistrate chosen to draw an inference hostile to the wife; but, speaking for myself, when the magistrate says that he accepted the wife's story that she had not committed adultery, and accepted her explanation of the presence of these men on that occasion, I do not feel, sitting here on appeal, and with nothing but the written note to go on, that I am entitled to say that the magistrate ought necessarily to have drawn the inference that adultery was committed on that occasion, and so reverse his finding of fact. I feel bound to deal with this case on the assumption that the learned magistrate had material (the demeanour of the witnesses, and so forth) from which he could take the more lenient view. I shall come back to that incident. Finally, it was proved at the first hearing in July, 1944, that the wife was very shortly about to give birth to a child. The hearing was adjourned, and by the time of the resumed hearing the wife had given birth to the child on July 30. That fact was known to the learned magistrate, and it was known that the child had been born alive. Now, as I have already said, evidence had been given, and as I think, legitimately given for a certain purpose, by the husband, and, incidentally, confirmed by the wife in terms, that the last time the husband had sexual intercourse with her, having regard to this incident in connexion with the venereal disease, was in the previous July. It is true that that evidence, so far as I can see, was not given with reference to the birth of the child. At any rate it was legitimate from the husband's point of view on the issue of condonation. I am not sure that there was any issue on which the wife could legitimately give the evidence, except as tending to confirm the husband's evidence that there had been no condonation, and it is said, therefore, that because the evidence was given legitimately it can be used illegitimately; in other words that it can be used in defiance of the case of *Russell* v. *Russell* (1) to prove that a wife who gave birth to a child in July, 1944, must have committed adultery, because there was evidence given by the spouses, but only by the spouses, that there had been no sexual intercourse since the July preceding. I ought to say, however, that the wife, while saying in so many

(1) [1924] A. C. 687.

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words that there had been no subsequent intercourse, also said that she had not committed adultery with anybody, and that her husband was the father of the child. She was evidently a very stupid witness. The learned magistrate says that she was very hard of hearing, that she spoke with an impediment, and that it was by no means certain that she really understood any question that was put to her. But apart from the law on the matter, there is a very clear illustration of the danger attaching to evidence of this character—as is recognized by the highest tribunal—in the very fact that the wife gave this directly contradictory evidence on this highly controversial topic.

I can deal with this matter in a few sentences. I am not going to delve deeply into the report of *Russell* v. *Russell* (1) in the House of Lords. It is sufficient to look at the decision in *Ettenfield* v. *Ettenfield* (2), and to the judgment of the Court of Appeal (3), to show that that case, by which we are bound, exactly covers this point, for it was with reference to the well-known practice before the decision in *Russell* v. *Russell* (1) that the Court of Appeal gave their judgment in these words :— they say that the petitioner was formerly asked " when did you " last have intercourse with your wife ? " and then there was the proof of the birth outside the period of gestation. It is exactly this case, with this exception, and this exception only, that the evidence about the date when he last had connexion with his wife was not necessarily adduced as a prelude to the production of the birth certificate ; it was, as I think, given with another object ; but however that may be, the position appears to me to be, whether it was originally given with the one object or the other, or both, that as soon as it is attempted to connect that evidence with the sequel of the birth of a living child outside the period of gestation, for that purpose, at any rate, it is inadmissible and must be ignored altogether. It may be admissible for another purpose, but it is not admissible for that purpose. That seems to me to be the plain effect of the decision both in *Russell* v. *Russell* (1) and in *Ettenfield* v. *Ettenfield* (2), and so long as those decisions stand there can be no argument about the matter ; and I am not prepared to listen to an argument that because the evidence may have slipped out inadvertently, without reference to this question, but was given none the less, or because it was legitimate for some other purpose, therefore it may be taken out of its legitimate context

(1) [1924] A. C. 687.
(2) [1940] P. 96.
(3) Ibid. 103.

and used in an illegitimate context, contrary to the law as it stands. That being so, in my opinion, for all purposes connected with this case, including the question whether there was, apart from proof of adultery, reasonable ground for suspecting adultery, that particular element in the case must be rejected altogether, because in the last analysis it must depend (if the evidence is looked at at all for any purpose) upon the wrongful admission in relation to adultery of the evidence " When did " you last have intercourse with your wife ? " I propose, therefore, to deal with this case on the rest of the material, and to ignore that matter altogether and for all purposes.

The question of the venereal disease is a very much more difficult matter, and I propose to read the learned magistrate's conclusion about it. Speaking of the written report which he had received, and which we have seen, he says : " I saw a " report on the wife stating that she had symptoms of gonorrhea " in August, 1943, and that the disease was not of long standing. " I also saw the defendant's military medical history sheet, " from which it appeared that he had had illnesses, etc., before " July, 1943, but no V.D., and that, as he said, he suffered from " gonorrhea in August, 1943." The learned magistrate goes on : " On this evidence I held that it was impossible to decide " which of the spouses had infected the other, and that there- " fore the husband had failed to prove his defence justifying " his conduct, and must continue to support his wife and " family." Now, in respect that the husband was trying to drive home the charge of adultery by this evidence of venereal disease, I am in complete agreement with the magistrate in so far as he must be taken to have found that the husband had not proved thereby a charge of adultery. But it will be observed that the ground on which the learned magistrate expresses his doubt is that it was impossible to decide (and I quite agree with him) which of the spouses had infected the other, and, of course, one could only convict the wife of adultery by reason of the fact that she was suffering from venereal disease if, on the one hand, it were proved that she had contracted it at a time when she could not possibly have been infected by her husband or, on the other hand, the husband proved that he had not had connexion with any other woman and had not suffered from venereal disease before the time at which he could have been infected by his wife.

I have mentioned those two things separately for this reason : the latter is a mere question of whether the evidence of

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the husband is believed, and I think we must take it, having regard to the doubt expressed by the learned magistrate, that his doubt was not based upon any disbelief of the husband's evidence, but was a doubt whether, assuming the evidence to be true, it was possible to draw an inference hostile to the wife. I say that for this reason. The husband gave evidence that he had not had connexion with any other woman, he gave evidence that he had had connexion with his wife during that leave, which would have been a time (I think I am entitled to draw on knowledge from evidence given over and over again in this Court) within which he could have been infected, had she already been infected when he came on leave. If the learned magistrate did not believe the husband about that, and thought he was not telling the truth, that would be an end of the matter. The husband would not even begin to prove a case against his wife, and the proper thing would be to say " I do not believe the " husband ; I do not believe he is telling the truth about it ; " he does not make a case at all."

The other alternative which I mentioned is more difficult, for a reason which itself introduces a complication, which, before the learned magistrate was entitled to convict the wife of adultery upon it, would have required very technical evidence, needing to be scrutinized very carefully. In a statement which Mr. Gorst has obtained from the hospital during the adjournment, and of which I think I am entitled to take judicial notice for the reason I have already given (because I have had the same thing in evidence on more than one occasion, and there has never really been any dispute about it) we have been reminded that this disease may lie dormant for a very long time, and the mere fact that the wife was only found to be suffering from it ostensibly in August is not of itself conclusive that she had not been infected with it before the husband came home on leave in July, and infected by it at a time when she was not, in fact, having sexual intercourse with her husband ; but that would be a very difficult thing to prove, because it would involve defining the length of the dormancy, which I imagine would be almost impossible, except in certain extreme circumstances which cannot possibly arise in this case.

The learned magistrate is fully justified in his statement that he really could not decide positively which of the two spouses had infected the other, and, therefore, it was quite plainly impossible upon that incident alone to convict the wife of adultery. In my opinion, from the point of view of a charge of

adultery, that incident must be considered by itself and cannot be mixed up with other things. Either the husband proved the requisite facts from which adultery could be inferred with reference to the venereal disease or he did not. That being so, it is impossible for us to hold positively that the wife has committed adultery. Equally, I think that in so far as the learned magistrate was of that opinion, it would be idle, and, indeed, wrong, for us to send the case back to him or to anybody else for further consideration.

That brings me to what I think is the only remaining point, and is, as things have turned out, the real crux of this case. It is whether, short of proving adultery against the wife, the husband has nevertheless shown, and ought to be held to have shown, that he had reasonable cause for withdrawing from cohabitation in the sense that he was not a deserter. I do not fail to observe that in his very careful judgment the learned magistrate does recognize that the issue is whether the husband has shown that he had reasonable cause for the admitted withdrawal, and that it is for the husband to justify his conduct in withdrawing from cohabitation, but although the approach is perfectly correct in that sense, I am not sure that the learned magistrate has considered as a separate head of justification whether reasonable belief that his wife had been committing adultery (a belief induced by her own conduct) was of itself, though adultery was not found, sufficient to justify his withdrawal from cohabitation, so that he ought not to be held to be a deserter. That a wife's misconduct, short of proof of a matrimonial offence, can be a justification for withdrawal from cohabitation, has been recognized ever since the well-known decision in *Russell* v. *Russell* (1), and it is, I think, clear, both from that case and from the case of *Thomas* v. *Thomas* (2), that conduct which, though not in itself a matrimonial offence, would afford an answer to a petition for restitution of conjugal rights, would itself be sufficient to absolve a husband from a charge of desertion. In other words, it is now recognized that the issue with regard to conduct of a wife short of a matrimonial offence is precisely the same whether the husband is resisting a decree for restitution of conjugal rights or is resisting a charge of desertion. That being so, was the wife's conduct here (leaving aside altogether this question of the birth of the child) such as to justify the husband in withdrawing from cohabitation? Had she so conducted herself as reasonably to lead the

(1) [1895] P. 315. (2) [1924] P. 194, 201.

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husband to believe that she had committed adultery (though ultimately it was held that she had not) and, if so, is that sufficient to enable the husband to resist the charge of desertion? Before I cite the cases which I think assist on this point I would like to say that it seems to me that it would be most unreasonable if it were not so. Take a hypothetical case, in which, short of actual and direct proof of adultery, the wife so conducts herself to the knowledge of the husband as to warrant the inference that adultery has been committed, though (I am supposing) that is ultimately held not to be the fact. The husband knows all the circumstances of the wife's conduct. If he continues to live with her he is in danger of being held to have condoned, because he has taken her back with full knowledge of the circumstances from which adultery could be inferred. I do not say that is conclusive, because it might be said that he did not know quite enough; but there is quite plainly that risk, on the one hand, whereas, alternatively, if he withdraws from cohabitation on grounds that tend to a legitimate conviction of adultery reasonably held and honestly believed in, he is to be liable to be found a deserter. It seems to me to put the husband in an almost impossible position, if that is the law. But the question is whether it is the law. I do not think it is. I think that if the wife has so conducted herself as to lead any reasonable person to believe, until she gives some explanation, that she has committed adultery, the husband, becoming aware of the facts and honestly drawing that inference, and leaving his wife on that ground, ought not to be held to have left her without reasonable cause.

How does the matter stand in this case? In fact, though there was controversy about it, the husband had given evidence that some years before the wife had given him grave cause of anxiety with another man, and that he had forgiven her. He then had this incident in connexion with the venereal disease, in which I am assuming that the learned magistrate has found, at least, that he is telling the truth in saying that he himself had not contracted it adulterously elsewhere. The husband, with that background, comes home at 1.30 in the morning, and is refused admission to the house in the circumstances which I have described, and of which, until months afterwards, he received no sort of explanation. I certainly think that that combination of circumstances (and, of course, I am referring in particular to her conduct on the night of the 17th October) was sufficient to give any man reasonable cause to suppose that

she was committing adultery, and I am prepared to assume in the husband's favour that he held that belief not merely reasonably but honestly.

I must say in passing that I was in some doubt whether we ought not to refer the matter back to the magistrate for him to come to a conclusion, either on his recollection of the witnesses or on a further hearing, but we have been expressly invited by counsel for the wife to deal with this matter ourselves, if we came to the conclusion that there was evidence of reasonable cause short of proof of adultery. That the husband held that belief, and held it reasonably, I am prepared to hold in his favour. There remains the sole question whether that is enough. My own impression is that there is authority on the question of reasonable belief of adultery, but I cannot put my hand on it, and learned counsel have not been able to refer us to it, but the principle, I think, is really settled by two cases. There is, first of all, the case of *Haswell* v. *Haswell* (1), to which I need not refer in detail, where the husband caught the wife, not, indeed, in adultery, but allowing a man to indulge in improper overtures to her, and it was held (and the case has been followed recently) that that was sufficient to afford reasonable cause. The issue actually arose on the question of the exercise of discretion on the ground of desertion, and, therefore, is very much in point, but I need not elaborate that. There is no doubt about that decision. But it might be said " Yes, but there he saw the very thing happen " which was itself held to be reasonable cause ; it is not a case " of drawing an inference or a belief " ; and it is there that, in my opinion, the case of *Ousey* v. *Ousey* (2), on which, also, so far as I know, no doubt has ever been cast, is of considerable importance. It was a case in which the husband had proved adultery against the wife, and the question was whether he should be refused relief on the ground that he had been guilty of desertion ; in other words, whether there was a discretionary bar, so that it raises as nearly as may be precisely the same issue. The husband had withdrawn from cohabitation, that is to say he had withdrawn from a marriage which had never been consummated, and, as Sir James Hannen complained with justice, the issue about the non-consummation of the marriage came before him for the first time on an issue of dissolution, and not on a charge of impotence or anything of that sort in connexion with nullity, and the matter was left

(1) (1859) 1 Sw. & Tr. 502. (2) (1874) L. R. 3 P. & D. 223.

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completely in doubt. I need not analyse the evidence, but Sir James Hannen said he must take it that the question of whose fault it was that the marriage was not consummated was one on which he was not able to arrive at any definite conclusion. He says, further, "I think I am justified on the "evidence before me in saying that it may well have been a "matter of doubt between these two persons on which side "the fault or physical defect lay. In such a state of things, "I think that a husband taking the view that the fault was "not with himself but with the wife, and in that state of mind "coming to the conclusion that the connexion between them "was intolerable, leading to misery and not to happiness, "because the wife was either unable or resolutely unwilling to "consummate, and therefore, leaving her, cannot be said to "have been guilty of such desertion as is contemplated by the "statute. His proceeding, if a mistaken one, would, I think, "under such circumstances, be excusable, and the court would "not be bound by reason of it to visit on him the penalty of "depriving him of the relief to which he would otherwise be "entitled in the event of the wife not remaining constant to "him." Then, after calling attention to the fact that the husband did not behave very generously, and had not even supported his wife during his withdrawal from cohabitation until he was compelled to do so, he adds "yet assuming, as I "do, that he so acted in consequence of the unhappy state of "things existing between them"; (and I emphasize these words) "and in consequence of a bona fide belief on his part "that she was wronging him, I think that cannot be pleaded "as desertion." Refusal of conjugal rights on the part of a wife, if proved, is a ground for the husband withdrawing from cohabitation. It has been held over and over again that that is a reasonable excuse, if proved. Adultery, if proved, is of course obviously a ground for withdrawing from cohabitation. But if refusal or failure to consummate a marriage on the part of a wife is not proved to be due to wilful refusal or to impotency and the matter is left in doubt, and yet the husband, while unable to prove the charge against her can escape the imputation of desertion on the ground that he reasonably believed that she was in fault, why does not exactly the same thing apply to circumstances provided by the wife herself which justify him in the belief that he has been wronged in respect of adultery? I cannot see any distinction between the two. It seems to me that if the one is a grave and weighty matter which justifies a

husband in resisting a petition for restitution, and entitles him to say that his conduct is not even a discretionary bar to divorce if he proves another matrimonial offence, it must equally be an answer to a substantive charge of desertion. For these reasons which, I regret to say, have gone to considerable length—but the case is one which I regard as of very great importance—I think that we ought to differ from the learned magistrate, and to hold that though no adultery was, in fact, committed, the wife had so conducted herself as to give the husband reasonable ground for supposing that she had committed adultery, and so to absolve him from the charge of desertion.

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PILCHER J. I agree and unless we had differed from the conclusion at which the learned magistrate arrived, after a very careful trial, I should not have found it necessary to add anything to what my Lord has said. The point really is a short one. It is clear that a husband charged with desertion without cause can set up to such a charge a defence that his wife has been guilty of a matrimonial offence. The point which arises for decision here is whether it is sufficient for the husband to say "Although I am unable by admissible evidence to satisfy a "tribunal that my wife has been guilty of the matrimonial "offence of adultery, yet I have proved conduct on her part "which justifies me in saying that I am entitled to leave her." My Lord has referred to the case of *Haswell* v. *Haswell* (1) in which it is made clear that a husband is entitled to leave his wife on proof by him of something short of the matrimonial offence of adultery. In that case the husband found his wife submitting to improper familiarities, and left her, and he was held justified in doing so. Again, I do not wish to refer at length to the case of *Ousey* v. *Ousey* (2). My Lord has analysed that case, and I agree so entirely with what he has said that I find it quite unnecessary to add anything, except to observe that in the case of *Whittaker* v. *Whittaker* (3), my Lord, in delivering the judgment of a divisional court, said, "Suffice it to say that there is authority "that a reasonable belief in the wife's adultery may afford a "defence to a charge of wilful neglect." With this statement I respectfully agree, and if such a reasonable belief by a husband affords a defence in proceedings based upon wilful neglect, it

(1) 1 Sw. & Tr. 502.
(2) L. R. 3 P. & D. 223.
(3) [1939] 3 All E. R. 833, 838.

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must also afford him a defence in proceedings based on desertion.

The point, therefore, is, had the husband on the facts of this case a reasonable belief that his wife had committed adultery either prior to July, 1943, or in October, 1943, when he caught the men in the house? So far as the point based on venereal disease is concerned, the matter seems to me to lie in this way: After hearing all the available evidence, the learned magistrate was unable to determine which spouse had infected the other, or whether either spouse had infected the other. The matter was left completely in doubt, and the husband, therefore, is in my view entitled to say "I honestly believed "that my wife had infected me. As some proof, at any rate, "of the honesty of my belief, I point to the fact that even after "a trial the tribunal was unable to say that it was not so." So much for the venereal disease. Concerning the incident of October, 1943, when the husband found three men in the house, and one man apparently in his wife's room, where his wife was in bed, the learned magistrate, in dealing with the credibility of the husband and the wife, who were the only two witnesses called, accepted the wife's story of that incident. He does not say in terms that he accepted her evidence or rejected her husband's evidence on any other point. But so far as that incident is concerned he accepted the wife's evidence that she had not committed adultery. Because the husband did not succeed in satisfying the magistrate that his wife was guilty of adultery, it does not mean that the husband had not, in fact, the gravest suspicions at that time that his wife had been committing adultery. It is to be observed, as my Lord has pointed out, that so far from offering any explanation, either in the middle of the night, when her husband turned up, or later in the morning, when he came to take away the baby, as to the presence of these men in the house, the wife actually barred the husband from the house between the hours of 1.30 a.m. and round about 8 a.m. That is one aspect of the case which no doubt was considered by the learned magistrate, but it is certainly a point which may well have struck the husband as being extremely suspicious. That is all I desire to say with regard to the October incident.

The only other matter is the birth of the second child on July 30, 1944. As my Lord has pointed out, evidence of non-access, which was given by both husband and wife, was only admissible on the issue, or possible issue, of condonation.

I think that there is an aspect of this matter which ought, perhaps, to receive some consideration. Both husband and wife, on the issue of condonation, were in agreement that no sexual intercourse had taken place between them since July, 1943. In October, 1943, the husband turned his wife out, or, at any rate, she left for a period, but she seems to have returned, because he finally turned her out again in January, 1944. He says in his evidence that he did so because he discovered that she was then three months pregnant. I do not gather that the learned magistrate has disbelieved that fact, although he may have rejected it, and held, properly, of course, that it was inadmissible for the reasons laid down in *Russell* v. *Russell* (1). When, however, the point under consideration is whether a husband has reasonable ground for leaving his wife owing to her conduct, it seems to me that certain knowledge by a husband that he has not had sexual intercourse with his wife for six months, coupled with the knowledge that six months later she is in the early stages of pregnancy, must induce in him not only a bona fide belief but a certainty that his wife has committed adultery, and where all that is in issue is whether the husband had or had not a bona fide belief that his wife has committed adultery, evidence by the husband of knowledge of the matters to which I have referred may not be inadmissible under the rule in *Russell* v. *Russell* (1), such evidence being directed only to his state of mind and not to the issue of whether adultery has, in fact, been committed.

Now, even if I am wrong on that, taken as a separate point, I am quite satisfied that this husband, having regard to the past history of his married life, to the occasions upon which it is apparent that he had had to speak to his wife, to the incident with regard to the venereal disease and the incident in October, was well justified in entertaining, and, I think, did entertain, a bona fide belief that his wife had committed adultery. That being so, on the authority of *Ousey* v. *Ousey* (2), in my view the husband was justified in leaving his wife in the way in which he did, whether this occurred in October, 1943, or in January, 1944, and I therefore agree with my Lord that this appeal must be allowed.

Appeal allowed.

Solicitor for husband : *J. C. Clifford Watts.*
Solicitors for wife : *C. V. Young & Cowper.*

(1) [1924] A. C. 687. (2) L. R. 3 P. & D. 223.

A. W. G.

C. A.

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May 4; *June* 8.

Lord Goddard, Lord Merriman P. and du Parcq L.J.

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Divorce—Demand by petitioner for payment by co-respondent of money in lieu of damages—Connivance.

The respondent, before her marriage to the petitioner, had lived with him, and later with the co-respondent, as a mistress. Two months after her marriage to the petitioner, the respondent left him for the co-respondent, and thereafter, in interviews and correspondence, the petitioner sought to induce the co-respondent to pay a large sum by way of damages, little or no insistence being laid on the cessation of the adulterous association between the respondent and co-respondent. The co-respondent having refused to pay the sums demanded, the petitioner sought dissolution of the marriage on the ground of the respondent's adultery with the co-respondent. Denning J. found the adultery proved, but that the petitioner had not proved that he had not connived at the respondent's adultery, and he dismissed the petition. On appeal by the petitioner :—

Held, (1.) that it is of the essence of connivance that it precedes the event, and, generally speaking, the material event is the inception of the adultery and not its repetition, though the facts may be such that connivance at the continuation of an adulterous association shows that the husband must be taken to have connived at it from the first ; (2.) that, assuming that s. 4 of the Matrimonial Causes Act, 1937, imposes any new burden of proof of non-connivance on the petitioner, it does not create a presumption of law that he has been guilty of connivance. The same strictness of proof is required in a matrimonial offence as in a criminal one, and the presumption of law has always been against connivance. The issue only arises if the circumstances are such as to lead to a suspicion of connivance, and it only becomes a determining factor if the court finds the evidence so nicely balanced that it is unable to reach a conclusion upon it ; (3.) that, where connivance is alleged, the issue is whether on the facts of the particular case the husband was, or was not, guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery ; and it is of the utmost importance that the court should not allow its judgment to be affected, by importing, as principles of universal application, pronouncements made with regard to wholly different circumstances ; (4.) that, on the facts of the present case, the husband's attempt to make a collusive bargain for damages for an admitted wrong could not be held on principle or authority to have effected a notional conversion of what was in fact strenuous objection on his part to the early stages of the adulterous association, into connivance at any stage of that association, and the appeal succeeded.

Quaere, whether, in a case where there is a real basis for a claim for damages, and the husband intends to prosecute his petition for divorce, the fact that he has received and retained the money paid

under a collusive bargain for damages bars him once and for all from saying that he has not connived at his wife's adultery.

Gipps v. *Gipps* (1864) 11 H. L. C. 1, considered; Dicta in *Poulden* v. *Poulden* [1938] P. 63, *Germany* v. *Germany* [1938] P. 202, and *Lloyd* v. *Lloyd* [1938] P. 174, as to onus of proof of connivance, disapproved.

APPEAL from Denning J.

The petitioner, Harold Churchman, first met the respondent, then Elizabeth Gertrude Betts, in 1932, and she became his mistress. The petitioner was then a married man, and obtained a divorce from his then wife in September, 1938, the court exercising its discretion in his favour, notwithstanding his adultery with the respondent. The respondent first met the co-respondent, Edward Hubert Hicks, a wealthy married man, about the end of 1938, and shortly afterwards gave up her association with the petitioner and began an adulterous association with the co-respondent. The petitioner first met the co-respondent in April, 1939, and during that year the respondent told the petitioner that she had been living with, and was going to marry, the co-respondent. The petitioner informed her that the co-respondent was already married. The respondent continued her association with the co-respondent until November, 1940, when she informed the petitioner that she had decided to break with the co-respondent unless he obtained a divorce and married her. The petitioner told the respondent that if she broke with the co-respondent he would marry her, and he did so on December 28, 1940. In January, 1941, the respondent again met the co-respondent in Chester, and told him that she had married the petitioner. In February, 1941, the respondent told the petitioner that she wanted to go back to the co-respondent, whose financial position was much better than the petitioner's. In the same month she finally left the petitioner. On February 26, 1941, the petitioner wrote to the co-respondent a letter containing the following passage: " When, several weeks ago, you learned that Betty was married, " the honourable course of conduct would have been either to " drop out or to see me—you did neither. You just continued " writing letters to her, tempting and enticing her and still on " the basis of your unproved word playing on her feelings. " You have made and still make no compromise suggestions " such as an interim period—probably such an unselfish " safeguard has not occurred to you as being the ' right ' thing " to do in such cases. All you ask is for *your* immediate wants

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" to be satisfied, and for these you use the pretext that they " happen to agree with what Betty, owing to your influence " and suggestion and enticings, considers are hers."

A meeting took place between the parties in May, 1941, at which the petitioner told the co-respondent that he still wanted his wife, and the co-respondent said that it was for the husband to take her. The wife said that she still felt that the co-respondent would get a divorce and make her independent, and refused to leave him. According to the co-respondent (whose version of all interviews Denning J. expressly accepted), the petitioner demanded money, said that he would get a divorce and adopted a threatening attitude. Nothing further occurred for some months, but by the end of 1941 the petitioner had decided to bring proceedings for divorce and to claim damages, but since only a year had elapsed since the marriage he could not present his petition, subject to the dispensing power of the court, for another two years; while, if he tried to get the marriage annulled on the ground of non-consummation, he could not claim damages. So the petitioner began to approach the co-respondent himself on the subject of damages, and after some correspondence they met at Doncaster on February 3, 1942. According to the petitioner damages were discussed, and he proposed a figure of 4,000*l.*, based on his own financial necessities, while the co-respondent made it clear that he was thinking only in hundreds. No decision was arrived at either then, or at a subsequent meeting in March, 1942. On March 28, 1942, the petitioner tried to bring matters to a head by a long letter setting out the details of his liabilities, appealing for the co-respondent's " utmost generosity," and offering in return any " favour " required by the co-respondent—namely, that he would not claim damages in the divorce proceedings. The true nature of the suggested transaction was made clear by the form of agreement for the respondent's signature enclosed in the letter, purporting to " set down and confirm " the decisions mutually reached " on matters affecting the husband, the co-respondent and the wife. The document contained the following clause: " You agree to bring no action " of any kind in this matter against me individually, and also " to divorce your wife, Elizabeth Gertrude Churchman, without " claiming in your petition any further damages in order that " the case may go through without my needing to defend and " so in such manner as will permit it to be conducted as quietly " as possible with a minimum of publicity to me or others.

" I in return agree to pay you, within one month from to-day's " date, as compensation and in full settlement of damages for " the loss of your wife the sum of (*l.*)."

To that letter, and to one or two further letters, the co-respondent returned no reply, and nothing in the nature of a corrupt bargain was ever actually concluded, though the co-respondent on one occasion gave the petitioner 5*l.* for his travelling expenses. In June, 1943, the petitioner took out an originating summons for leave to present a petition before the expiration of three years, but this was not proceeded with, and the petition was eventually presented on January 10, 1944. Denning J. held that the adultery was proved, but that the petitioner had not proved that he had not connived at his wife's adultery, and he dismissed the petition on that ground, and stated that he would not, in any case, have awarded damages in the circumstances. The petitioner appealed.

On March 19, 1945, when the appeal came on, the petitioner appeared in person : the co-respondent was not represented, and the wife, who had put in no answer to the petition, was not entitled to be heard. The court adjourned the appeal and directed that the King's Proctor be requested to assist the court by instructing counsel to argue the law relating to connivance. The case now came on for argument.

The petitioner in person.

Sir Donald Somervell A.-G. and *William Latey* for the King's Proctor : It is necessary to distinguish between connivance and collusion. If this bargain had been completed, and the money had been paid by the co-respondent, that might well have been held to be collusion. Broadly speaking, it was an attempt to make an agreement that the divorce should be undefended. As regards connivance, there is a distinction between an agreement as to damages entered into before and one made after the filing of the petition. It might well be said that it was not connivance if the petitioner's attitude was : " I am going to take proceedings for divorce. Nothing you may " say or do will deflect me from that course, but I would like " to agree the damages." If, on the other hand, his attitude is : " If you agree to pay me damages, I may alter my attitude " towards divorce proceedings," that would probably be held to be connivance.

[LORD MERRIMAN P. At the moment I see some difficulty in talking about connivance with reference to adultery in the past.]

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Counsel referred to the successive statutory provisions with regard to connivance in s. 31 of the Matrimonial Causes Act, 1857, s. 178 of the Supreme Court of Judicature Act, 1925, and s. 4 of the Matrimonial Causes Act, 1937. The dicta of Langton J. in *Germany* v. *Germany* (1) were obiter and based on a misconception. [They referred also to *Poulden* v. *Poulden* (2).] The change in the wording of the Acts has effected no change in the burden of proof; it is still the petitioner's duty to satisfy the court of the absence of connivance. But though onus of proof may have great importance in the course of the case, at the end, when all the evidence is before the court, arguments as to onus of proof pass out of the picture.

[DU PARCQ L.J. Lord Dunedin pointed out in the Privy Council in *Robins* v. *National Trust Co., Ld.* (3) that onus only came in if the circumstances were so nicely balanced that one was forced to decide the case on onus.]

The Act of 1937 really made no change in this respect. The cases are collected in Rayden on Divorce, 4th ed., p. 126, para. 16. The leading case of a great many is *Gipps* v. *Gipps* (4). There Lord Westbury says that connivance is not limited to the adultery alleged in the petition, but there is a good deal to be argued on that when it arises. It may be that mere acquiescence over a period of time would more naturally come under the discretionary bar of unreasonable delay, but there are some dicta suggesting that mere acquiescence with knowledge may amount to connivance. If the bargain in *Gipps* v. *Gipps* (4) had been limited to the first of the two agreements comprised in it, it does not appear that that would have been connivance, though it might have been collusion. But the issue of collusion was not argued, and did not arise if the House was satisfied that the second part of the bargain amounted to connivance. It seems clear that at any rate Lord Wensleydale and Lord Chelmsford did not regard the first agreement as amounting to connivance.

[LORD MERRIMAN P. In *Gipps* v. *Gipps* (5) in the court below, Sir Creswell Creswell says that the husband by accepting money had connived at his wife's previous adultery. It is from that that both Lord Wensleydale and Lord Chelmsford dissent.]

It is submitted that if the court is satisfied that the petitioner

(1) [1938] P. 202.
(2) [1938] P. 63, 67.
(3) [1927] A. C. 515, 520.
(4) (1864) 11 H. L. C. 1.
(5) (1863) 3 Sw. & Tr. 116.

is trying to make a collusive bargain, but that he is firmly determined in any event to pursue his remedy, from which he will not be deterred by any action on behalf of the respondent, then it might say there was no connivance.

[LORD MERRIMAN P. Is not the decision of at least the majority in *Gipps* v. *Gipps* (1) conclusive of this case in favour of the petitioner ?]

If there had not been the clause in one of the letters in *Gifford* v. *Gifford* (2) about " putting no obstacle in the way " of the decree nisi being made absolute," it would have been very difficult to say that the agreement in that case went beyond the first agreement in *Gipps* v. *Gipps* (1), but that brought it within the second agreement in *Gipps* v. *Gipps* (1), which the House of Lords clearly held was connivance. The ratio decidendi in both *Gipps* v. *Gipps* (1) and *Gifford* v. *Gifford* (2) is that if one finds the respondent and co-respondent living in adultery and the petitioner taking money in circumstances which involve the continuance of the adultery, then it is connivance at further adultery. [They referred to *Binney* v. *Binney* (3).]

The broad result of the authorities is this : (*a*) A husband is entitled to make every effort to get his wife back. (*b*) There may be cases in which it is reasonably obvious that he will not get her back. In such cases mere delay will not amount to connivance. (*c*) If there is evidence of a bargain under which the husband will modify the exercise of his rights, that is connivance, subject to this qualification, based on *Gipps* v. *Gipps* (1), that an agreement limited to payment of damages is not connivance.

Cur. adv. vult.

June 8. The judgment of the court was read by LORD MERRIMAN P., who stated the facts, and continued : Denning J. held that on the evidence of the co-respondent as to the interviews, and on the letters, the husband from February or March, 1942, had tolerated, acquiesced in and concurred in the continuance of his wife's adultery from that time onwards. The judge added, referring to the leading case of *Gipps* v. *Gipps* (1), that if the husband had actually received the 4,000*l.* there would have been connivance. His state of mind was the same whether he received it or not. The fact

(1) 11 H. L. C. 1.
(2) (1926) 43 T. L. R. 141.
(3) [1936] P. 178.

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that he did not get it, or only got 5*l.*, did not alter the position. The judge did not deal expressly with the question whether he regarded the connivance at the continuance of the adultery as amounting by ratification to connivance at the earlier adultery. It would seem that he regarded connivance at any stage of the adultery charged as fatal. The point is of importance, because it is of the essence of connivance that it precedes the event and, generally speaking, the material event is the inception of the adultery and not its repetition, although the facts may be such that connivance at the continuance of an adulterous association shows that the husband must be taken to have connived at it from the first. This proposition is well illustrated by *Gipps* v. *Gipps* (1), and it will be necessary to consider more closely the bearing of that case on the present appeal. Before doing so, however, two general observations may usefully be made. First: in the notes of his judgment Denning J. refers to *Lloyd* v. *Lloyd* (2). In that case Langton J. referred with approval to some observations of Bucknill J. on the change effected in the burden of proof in relation to connivance by virtue of the amendment by s. 4 of the Matrimonial Causes Act, 1937, of s. 178 of the Judicature Act, 1925, which in turn substantially reproduced, but in different language, the effect of s. 31 of the Matrimonial Causes Act, 1857. Bucknill J. appears to suggest that in placing expressly upon the petitioner the burden of satisfying the court of the absence of connivance the legislature had reversed the presumption of law against the existence of connivance—(see also *Germany* v. *Germany* (3), per Langton J.). As the Attorney-General pointed out in the course of his argument, it is vital to a correct approach to the determination of the question of connivance that the effect of the present enactment should be appreciated. That it places the burden of proof on the petitioner is indisputable; whether a radical change in the law was thereby effected may be open to question. The issue does not arise at all unless the circumstances are such as to lead to a suspicion of connivance calling for investigation. Once the issue has been raised it might well be thought that, since in most cases of connivance, if not necessarily in all, the facts, including the all-important fact of his state of mind, are so especially in the knowledge of the party himself, the burden of dispelling suspicion once aroused was always on the party,

(1) 11 H. L. C. 1.
(2) [1938] P. 174, 195.
(3) [1938] P. 202, 206.

even under the former wording of s. 178. It is worthy of note that in *Gipps* v. *Gipps* (1) Lord Wensleydale stated the issue raised by s. 31 of the Matrimonial Causes Act, 1857, in almost exactly the word of the present enactment. After saying that the law of divorce was now regulated by the new Act of Parliament and that the court was bound to pronounce a decree of dissolution on certain conditions particularly mentioned in the Act of 1857, he continued: "These are the conditions. "That the court is to be satisfied as far as it reasonably can, "that the adultery has been proved, and that the petitioner "has not been in any manner accessory to, or conniving at, "the adultery, and that he has not condoned the same. These "are the only material parts of the Act to which it is necessary "to advert as applicable to this case." The fact that Lord Wensleydale, in spite of his thus stating the issue in the sense least favourable to the petitioner, dissented from the other noble Lords by determining the issue in his favour, in no way detracts from the weight of the passage cited. Incidentally, it is worthy of note that it has always been the practice in the affidavit verifying a petition based on adultery to require the petitioner's oath that he has not connived at the adultery (see s. 41 of the Matrimonial Causes Act, 1857). But it is not necessary to express any final opinion on the question where the burden of proof lay under the earlier Acts or on the reasons for the change in the wording. Assuming that the present Act deliberately imposes a new burden on the petitioner this cannot in our opinion mean that there is now a presumption of law that he has been guilty of connivance. The same strict proof is required in the case of a matrimonial offence as is required in connexion with criminal offences properly so called. Connivance implies that the husband has been accessory to the very offence on which his petition is founded, or at the least has corruptly acquiesced in its commission, and the presumption of law has always been against connivance. The limited effect of the statutory imposition of the burden of proof upon a party charged with an offence is well illustrated by the case of *Attygalle* v. *The King* (2). The Ceylon Evidence Ordinance No. 14, 1895, provides by s. 106 that "when any fact is "especially within the knowledge of any person, the burden of "proving that fact is upon him." This enactment was obviously intended to reproduce the corresponding principle of the English law of evidence. This is stated, for example, in the same sense

(1) 11 H. L. C. 1, 23. (2) [1936] A. C. 338.

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in s. 376 of Taylor on Evidence, 12th ed., and the fact that this very general statement certainly requires qualification is not germane to the present question. The question at issue in *Attygalle* v. *The King* (1) was whether an operation, at which the two accused and the unconscious subject alone were present, was an illegal operation. The trial judge in his summing-up invoked this section of the ordinance as laying on the accused the burden of proving that no illegal operation took place. The Privy Council held that the direction was incorrect and that s. 106 of the ordinance notwithstanding, it was not the law of Ceylon that the burden is cast on an accused person of proving that no crime has been committed. We are, therefore, unable to agree with the view expressed in *Germany* v. *Germany* (2), and the other cases referred to above, that a change in the burden of proof, assuming that it has occurred, operates to produce a presumption of guilt of connivance when the presumption has hitherto been the other way. After all, as du Parcq L.J. pointed out during the argument, the incidence of the burden of proof as a determining factor of the whole case is only of importance if the tribunal finds the evidence, pro and con, so evenly balanced that it can come to no definite conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it and need not be further considered (per Lord Dunedin in *Robins* v. *National Trust Company* (3). Except in this sense we are unable to accept the view that the presumption of law with regard to connivance has in any way been reversed.

Secondly: much of the difficulty in dealing with the question of connivance arises from the fact that in the past judges have gone beyond the facts of the particular case in an attempt to lay down general principles of wider application. In our opinion it is of the utmost importance to bear in mind that the issue is whether, on the facts of the particular case, the husband was or was not guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery; and that the court should not allow its judgment to be affected by importing, as principles of universal application, pronouncements made with regard to wholly different circumstances, and so be led to a conclusion contrary to the justice of the case. This observation is relevant to the examination of the leading case of *Gipps* v. *Gipps* (4), which it

(1) [1936] 2 A. C. 338.
(2) [1938] P. 202.
(3) [1927] A. C. 515, 520.
(4) 11 H. L. C. 1.

is now necessary to make. In that case the parties, who had been married in 1851, separated in 1860. In that year the husband was about to file a petition against his wife and the co-respondent, praying for damages and for a dissolution of the marriage on the ground of the wife's adultery with the co-respondent; but, the co-respondent being anxious to avoid publicity, negotiations took place resulting in an agreement that a sum of 3,000*l.* should be paid by the co-respondent to a mutual friend to abide the event of the petition, that this sum should be in lieu of costs and damages, and that the petition should not contain a claim for damages. The sum of 3,000*l.* was paid accordingly and no claim for damages was made in the petition. Pausing there, it will be observed that, in contrast with the present case, the collusive bargain with regard to damages was not merely concluded, but the money was actually paid over. In June, 1861, the case came on for hearing but the husband consented to withdraw his suit in consideration not merely of the sum of 3,000*l.* already mentioned, but on the co-respondent agreeing to secure the further sum of 4,000*l.* payable on the death of his mother, and in the meantime to pay interest at five per cent. The petition was called on. No evidence was offered in support of it and it was dismissed. Afterwards the co-respondent refused to implement the agreement in respect of the 4,000*l.* The husband filed a Bill in Chancery for specific performance, to which the co-respondent demurred, and Wood V-C., as he then was, in November, 1861, allowed the demurrer. In June, 1862, the appellant filed a second petition in the Divorce Court based on the fresh acts of adultery of the wife with the co-respondent from August, 1861, up to the date of the petition. Sir Cresswell Cresswell dismissed the petition on the ground that the co-respondent had connived at the adultery. The principal ground of his decision was that, the husband having already received the 3,000*l.* to cover damages and costs, the agreement for the additional 4,000*l.* could only be regarded as purchase money for giving up his right to a divorce. But there are passages in the judgment which suggest that he regarded the first agreement not only as collusive but also as evidence of connivance. The decision was upheld in the House of Lords by the Lord Chancellor (Lord Westbury) and Lord Chelmsford, Lord Wensleydale dissenting. The ratio decidendi was that the husband, having made a corrupt bargain to forgo his right to a divorce in respect of the beginning of the adulterous association, could

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not afterwards present a petition in respect of the almost inevitable continuance of the same association. But it is to be observed that Lord Wensleydale objected (1) to the Judge Ordinary's judgment on the ground that " there has been no " consent to the first adultery, and no connivance in the proper " sense of the word, by insisting on and receiving compensation " for an admitted wrong. This compensation was paid in an " irregular and unauthorized manner ; but still its nature is not " altered ; it is still nothing but a payment of damages for a " past injury, wholly inexcusable." Lord Chelmsford (2) expressly agreed with Lord Wensleydale that the Judge Ordinary was in error in holding that the compromise of the first petition amounted in itself to connivance at the subsequent adultery. It was the withdrawal of the first petition in consequence of a corrupt bargain, which he later attempted to enforce that was held to have ratified the adulterous association from the outset and to bar relief in respect of its continuance. The actual decision in *Gipps* v. *Gipps* (1), so far from telling against the present appellant, seems to us to be strongly in his favour. In our opinion the learned judge in the present case misdirected himself in basing his decision, as he did, on the following passage in the speech of the Lord Chancellor (3) :—" Still " more must ' conniving at ' include the case of a husband who, " having discovered the adultery of the wife, takes a sum of " money from the adulterer upon an engagement not to " complain of the acts of the wife, but to abandon his legal " remedy, and then leaves the wife in such a situation as cannot " but facilitate the continuance or renewal of the adulterous " intercourse." The whole emphasis of this passage is on the words " upon an engagement not to complain of the acts of " the wife."

But it is not only in a case where the husband has bargained away his rights that he has been held to have connived at the continuance of the association, if not at its inception. In *Gifford* v. *Gifford* (4), it was disclosed in the course of the hearing of an undefended petition for divorce founded on adultery that the husband and the co-respondent had agreed that the co-respondent should pay 2,500*l.* damages, of which 1,750*l.* was to be paid down and the rest paid later, and that the petitioner should claim no further damages from the co-respondent and should put no obstacles in the way of a decree

(1) 11 H. L. C. 1, 26.
(2) Ibid. 27.
(3) Ibid. 14.
(4) 43 T. L. R. 141.

nisi being made absolute. At the time when the case was heard it was, of course, impossible for a respondent to take any steps to make absolute a decree nisi. This petition was dismissed on the ground that the suit was collusive. The wife and the co-respondent continued to live in adultery and the petitioner, who had retained possession of the 1,750*l.*, presented a second petition complaining of the adultery since the date of the former petition. Lord Merrivale said that it was obvious that by the original agreement the husband had prevented himself from complaining any more of adultery, whether that adultery was past or future. He had received the 1,750*l.* and had spent it. He held that the petitioner, once and for all, had bargained away his claim, which had been met by an agreement and the payment of a sum of money, and it was impossible to say that he did not connive. The report does not show whether *Gipps* v. *Gipps* (1) was considered. It may be that Lord Merrivale felt that the circumstances, including the undertaking to facilitate the decree nisi, would have justified the dismissal of the first petition on the ground not only of collusion but of connivance. Failing this we should prefer to reserve our opinion whether, in a case where there was a real basis for a claim for damages and the husband intended to prosecute his petition for divorce, the fact that he had received and retained the money paid under a collusive bargain for damages barred him, once and for all, from saying that he had not connived at his wife's adultery. It goes without saying that coupled with other marks of a corrupt intention, the making of a collusive bargain about damages may be cogent evidence of connivance. In this case, for example, the husband admitted that in a letter to the co-respondent, dated December 7, 1940, only three weeks before the marriage, he was suggesting that the co-respondent should make some financial settlement on the wife by way of compensation for "breach of promise"; that the reference to "previous conditions" in a telegram which he sent to the co-respondent on February 24, 1941, immediately after the wife had left him, referred to the same suggestion; and that in the first week after the marriage he had borrowed 50*l.* from the wife, which he knew could only have come from the co-respondent. If it had been possible to establish a connexion between these facts and the subsequent overtures for damages, and to draw the inference that the marriage itself was part of a concerted scheme to get money out of the co-respondent, the case might have assumed a very

(1) 11 H. L. C. 1.

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different aspect. But nothing of the kind was put in cross-examination by counsel for the co-respondent, nor is it suggested in the judge's judgment. On the contrary, we are satisfied that the appellant was devoted to his wife, as she herself expressly admitted; that he bitterly resented her adultery and did his best at first to bring it to an end. Unlike either of the cases referred to, this petition is in respect of adultery committed during the period from the inception of the adulterous association up to the time of the collusive negotiations, though it also includes a charge in respect of the later period. That the husband made overtures for a bargain of a disgraceful character is indisputable, and if these negotiations had reached fruition his petition would have been liable to dismissal on the ground of collusion. But the question in this appeal is whether the husband's attempt to make a collusive bargain for damages in respect of an admitted wrong, can be held to have effected a notional conversion of what was in fact strenuous objection on his part to the early stages of the adulterous association, into connivance at any stage of the association, whether past or future. We are unable to hold that such a conclusion is justified either by principle or authority, and this appeal must be allowed.

The court intimated that as a period of six months had almost expired since the judgment of Denning J. on December 13, 1944, the decree nisi would be antedated to that date, and the petitioner would be at liberty to apply for a decree absolute on or after June 13, 1945.

Appeal allowed.

Solicitors: *The King's Proctor; Shaen, Roscoe & Co.*

J. W. H.

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Apr. 12; *May* 18.

Denning J.

NORTON *v.* NORTON.

Practice—Divorce—Petition—Denial of adultery—Cross-petition—Consolidation—Subsequent admission of adultery—Costs against co-respondent—Pleadings—Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 50.

Where a co-respondent seeks only to contest the claim by the petitioner for damages the proper course is for him to plead in his answer to the petition that he does not admit that the petitioner

has suffered any damage. The practice sometimes followed in such cases of denying adultery solely for the purpose of affording an opportunity of mitigating the damages should be discontinued.

If a respondent desires to bring a counter-charge of a matrimonial offence against the petitioner the proper place for her to do so is in answer to the husband's suit and not by a separate petition, for it is the duty of the court, in considering the husband's petition, to inquire into any counter-charge made against him.

An order for consolidation of petition and cross-petition may be made wherever the second suit might from its start have been joined with the first suit.

Forbes-Smith v. *Forbes-Smith* [1901] P. 258 not followed.

The effect of an order of consolidation is not merely to link the two actions for the purpose of trial but to make them one suit, and the judge, in the exercise of his discretion, can order the co-respondent to pay the costs incurred and to be incurred by the husband in the two causes both before and after consolidation, including the sums provided by him for the wife's costs.

CROSS-PETITIONS for divorce.

On May 22, 1942, the husband filed a petition for divorce against his wife on the ground of her adultery with her brother-in-law, and claimed damages and costs against the co-respondent. The respondent and co-respondent filed answers merely denying adultery. On September 3, 1942, the cause was set down for trial, but before the hearing, on March 3, 1943, the wife launched a separate petition against her husband charging him with cruelty and asking the court to exercise its discretion in her favour in respect of her adultery with the co-respondent. On October 6, 1943, the court ordered the suits to be consolidated, and the consolidated cause came before the court on April 12, 1945, when the wife and the co-respondent admitted adultery.

The husband was granted a decree nisi on the ground of his wife's adultery. The counter-petition charging cruelty was dismissed, and 200*l*. damages were awarded to the husband against the co-respondent. Judgment was reserved on the question of the extent of the co-respondent's liability for costs.

Scott-Henderson for petitioner.

Tyndale K.C. and *Boyd* for respondent and co-respondent.

Cur. adv. vult.

May 18. DENNING J. In this case the parties were married on August 17, 1915. About 1939 the wife started a love affair with her brother-in-law. On May 22, the husband filed a petition in which he joined the brother-in-law as co-respondent

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and claimed against him damages and costs. The wife and brother-in-law appeared by the same solicitor and filed answers merely denying adultery. That denial was put in not because they ever intended to contest adultery, but because it has been thought by some practitioners that in this division, in order to dispute damages, a co-respondent who admits adultery must nevertheless file an answer denying it. I think that practice should be changed. If a co-respondent has no intention of contesting the issue of adultery, and does not wish to reserve the point, the proper course is for him to plead that he does not admit that the petitioner has suffered any damage.

On September 3, 1942, the husband set down the cause for trial, but before it came on for hearing the wife, on March 5, 1943, launched a separate petition for divorce against her husband, charging him with cruelty. In it she asked the court to exercise its discretion in her favour, because she was living in adultery with her brother-in-law. There was no reason why this charge of cruelty and this cross-prayer should not have been raised in the husband's suit. That was, indeed, the proper place for it, because it is by statute the duty of the court, in considering the husband's petition, to inquire into any counter-charge which is made against him. It should have been raised by the original answer or by amendment of it. The additional delay, expense and inconvenience caused by the separate petition was of no advantage to the husband or the wife. The only person whom it might advantage was the co-respondent, and in his case only because of certain decisions of the courts on costs, to which I will refer.

On October 6, 1943, the court ordered the cross-suits to be consolidated. The effect of consolidation is not merely to link two suits side by side and cause them to be tried at the same time. It makes them one suit as effectively as if the wife's counter-charge and cross-prayer had been raised by her answer. That is well illustrated by the order made on January 28, 1944, in the consolidated cause. By it the husband was ordered to pay into court the sum of 25*l.* 10*s.* 3*d.*, being the amount of the wife's taxed costs, and was further ordered to lodge in court, or give a bond to secure, another 30*l.*, estimated as sufficient to cover the wife's costs of and incidental to the hearing of the cause. That order treated the two suits as one. The 25*l.* 10*s.* 3*d.* was the wife's taxed costs in the two suits whilst separate, and in the consolidated suit up to that time. The 30*l.* was the estimated cost of the trial of the consolidated suit.

The figures were not severed between the two suits. They were fixed for the one consolidated suit. On April 12, 1945, the consolidated cause came before me. The wife and the co-respondent were represented by the same counsel and solicitors, and while the husband's counsel was opening the case counsel for the wife and co-respondent intervened to say that adultery was admitted, thus showing that the answers denying adultery were really only put in for the purpose of disputing damages, a practice which, as I have already mentioned, I think should be changed. Later, when addressing me on the question of damages, counsel for the co-respondent urged that the cruelty of the husband to the wife should be taken into account, citing an authority for the purpose, thus showing that the co-respondent was availing himself of the wife's counter-charge.

In the result, I found that the counter-charge of cruelty failed. I granted the husband a decree nisi on the ground of the wife's adultery, and I awarded him 200*l.* damages against the co-respondent. I allowed the wife her costs up to the amount of security, because that was really for the protection of her solicitor. When, however, I proposed to order the co-respondent to pay the costs to which the husband had been put, including the costs which he had had to provide for his wife, counsel cited authorities to show that I had no jurisdiction to order the co-respondent to pay any part of the costs on the wife's cross-petition. He conceded that if the wife had raised the counter-charge and cross-prayer by her answer, instead of by cross-petition, I could have made the order, thus exposing the reason why she raised the counter-charge and cross-prayer by cross-petition.

I am satisfied that the co-respondent was the cause of the breaking-up of this marriage. All the costs of these proceedings in both suits were caused by his initial wrong-doing. I am also satisfied that the steps taken by the wife were due to the claim by the husband for damages and costs against the co-respondent. She acted in the interest of the co-respondent. That is why she contested the suit, although she desired a divorce. That is why she put in an answer denying adultery when it was apparent to all concerned that she was guilty of it. That is why, months later, she made a counter-charge of cruelty. That is why she put it forward by way of cross-petition, instead of in her answer to the petition. In these circumstances, if I have a discretion to order the co-respondent to pay the costs of the cross-petition, I shall do so.

The authority relied on by counsel for the co-respondent was

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Earl v. *Earl* (1). That was a decision of Hill J., who thought he was bound by what Collins L.J. had said in *Forbes-Smith* v. *Forbes-Smith* (2), where a wife brought a suit for judicial separation on the ground of cruelty, and the husband brought a cross-suit for divorce on the ground of her adultery. There was an order for consolidation, but the Court of Appeal held that the co-respondent could not be made liable for the costs of the wife's suit because the suits could not, strictly speaking, be consolidated. The decision in *Forbes-Smith* v. *Forbes Smith* (3), however, must now be read, in the light of the decisions of the Court of Appeal in *Horwood* v. *Statesman Publishing Co.* (4) and *Bailey* v. *Curzon* (*Marquess*) (5), which show that an order for consolidation may be made wherever the second suit might from its start have been joined with the first suit, and that the power to consolidate has increased in recent years with the changed practice as to joinder, thus rendering former cases obsolete. In 1901, if a wife brought a suit for judicial separation on the ground of cruelty, a husband was not allowed to file in that suit an answer claiming divorce on the ground of her adultery. That may explain the decision in *Forbes-Smith* v. *Forbes-Smith* (3). The practice has changed, however, and the husband in such a case would now be allowed to file an answer claiming divorce for adultery. In these circumstances, it seems to me that *Forbes Smith* v. *Forbes-Smith* (3) is one of the cases to which Scrutton L.J. referred in *Bailey* v. *Curzon* (*Marquess*) (5) when he said that they had ceased to be binding authorities. With it goes *Earl* v. *Earl* (1).

Relieved of those cases, I am of opinion that in this case the order for consolidation was properly made and that its effect was to make both suits part of the " proceedings " of which the costs are in my discretion under s. 50 of the Judicature Act, 1925. In the exercise of my discretion, I order the co-respondent to pay the costs incurred and to be incurred on behalf of the husband in these causes both before and after the order for consolidation, including the sums provided by him for the wife's costs.

Solicitors for the husband : *Stoneham & Sons.*

Solicitors for the wife and co-respondent : *Goodman, Brown & Co., for R. C. Garrod, South Harrow.*

(1) (1926) 96 L. J. (P. D. & A.) 23.
(2) [1901] P. 258, 271.
(3) [1901] P. 258.
(4) (1929) 141 L. T. 54.
(5) [1932] 2 K. B. 392.

V. J. M. S.

THE F. J. WOLFE.

1944
Oct. 12.
1945
Feb. 16; June 18, 19, 29.
Pilcher J.

Shipping—Collision—Convoys meeting on crossing courses—Respective duties and obligations—Regulations for Preventing Collisions at Sea.

The *E. S.* was the leading ship in the third column from the port side of an eight-column convoy of over thirty ships. The *F. J. W.* was the commodore ship in the port column of a convoy of four ships proceeding in two columns. The convoys, which were unlighted, were approaching each other on crossing courses which, if continued, would bring the smaller convoy into collision with the leading ships in the port columns of the larger convoy. The *E. S.*, the give-way ship under art. 19 of the Collision Regulations, sighted the looms of the *F. J. W.'s* convoy at a distance of about three miles, bearing on the starboard bow, but she took no action until she was about two to three cables distant from the *F. J. W.*, when she starboarded her wheel. At about the same distance the *F. J. W.* starboarded her wheel and reversed her engines, but her stem struck the starboard side of the *E. S.* at right angles :—

Held, that in the absence of official guidance as to the action which was appropriate when convoy met convoy, while the collision regulations, as such, did not apply, they constituted a code recognized by all maritime nations as well adapted for preventing collision ; that a unit of one convoy involved with a unit of another convoy on a crossing course, should as a matter of good seamanship take the action prescribed by the collision regulations, provided that time and opportunity existed to do so ; that the *E. S.* as the give-way ship was not justified in standing on as long as she did, and that the *F. J. W.*, which had to keep her course and speed until the collision could not be avoided by the action of the give-way ship alone, did not act too soon and when she acted took the right action ; and that the *E. S.* was alone to blame.

ACTION OF DAMAGE.

The plaintiff was the Attorney-General suing in respect of a collision which took place in the early morning of September 16, 1942, off the coast of Newfoundland, between the *Empire Soldier*, a screw steamship of 4,539 tons gross laden with war stores, and the defendant's motor tanker *F. J. Wolfe*, of 12,190 tons gross (hereinafter referred to as the *Wolfe*). The *Empire Soldier* was leading the third column from the port side of an eight column convoy consisting of over thirty ships homeward bound to the United Kingdom. The *Wolfe* was the commodore ship of a small convoy of four ships in two columns and was leading the port column. Following her, in the port column was the *D.* The leader of the starboard column was

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the *P.* and following behind the *P.* was the *M.* The weather was fine and clear. At intervals during the night there had been displays of northern lights. Both convoys were sailing without lights, and the range of visibility for unlighted objects to the northward against the background of the northern lights being considerably greater than it was to the southward the *Empire Soldier* made out the vessels comprising the *Wolfe's* convoy substantially before any member of that convoy became aware that a large convoy was approaching them on a broad front from the southward. The *Wolfe's* convoy was in fact proceeding across the front of the *Empire Soldier's* north-bound convoy on a crossing course, the angle of intersection of the courses being 57°, and the position was such that if no action were taken by either convoy all the units of the *Wolfe's* convoy would become involved with some of the leading ships in the three port columns of the *Empire Soldier's* convoy. The *Empire Soldier* sighted the *Wolfe's* convoy at about three miles, bearing about 2 to 2½ points on her starboard bow. She kept her course and speed. The bearing of the *Wolfe* did not alter and by the time the distance had closed to about one mile the second officer who was in charge realized that these vessels were a convoy in formation on a course crossing his own from starboard to port. He took no action and the vessels continued to approach with the *Wolfe* still on the same bearing. When the vessels were a little under half a mile apart the *Wolfe* switched on first her red and shortly afterwards her masthead and green lights. No helm action was taken by the *Empire Soldier* until the vessels were so close that it was apparent that the *Wolfe* was going to strike the starboard side of the *Empire Soldier* stem on. At the last the wheel of the *Empire Soldier* was put hard-a-starboard in order to throw her afterpart away from the advancing *Wolfe*. From first to last the engines of the *Empire Soldier* remained working to give her the convoy speed of 6½ knots. The *Empire Soldier* went off about a point to starboard under her hard-a-starboard wheel at the last and did not switch on her lights till a late moment. Those on the *Wolfe*, which was making her convoy speed of 7 knots, sighted the loom of an unlighted vessel which proved to be the *Empire Soldier* about 3 points on the port bow at a distance of about half a mile, and the helmsman was ordered to starboard 5°. Shortly afterwards her second officer appreciated that what he had seen was not an escort vessel, as he had supposed, but a cargo vessel on a northerly course

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crossing his own. He immediately ordered the wheel to be put hard-a-starboard, blew a short blast, put the starboard engine full astern and switched on his port sidelight. This action was taken when the vessels were about three cables distant from each other. Shortly afterwards, seeing that the *Empire Soldier* was apparently taking no action to keep clear, he rang the starboard engine full astern and switched on his masthead and starboard lights. By this time the vessels were only about two cables apart and collision was virtually inevitable; and the stem of the *Wolfe* cut into the starboard side of the *Empire Soldier* at about a right angle.

Carpmael K.C. and *Owen Bateson* for the plaintiff. The whole trouble was caused by the bad look-out on the *Wolfe*. The other vessels of her convoy sighted the *Empire Soldier's* convoy at a considerably greater distance and had time to act, and the *Wolfe* should have altered and got on to an opposite or parallel course with the *Empire Soldier*, as others of her convoy did. But if she had not altered at all she would in fact have passed clear and her premature starboarding brought about the collision.

Hayward K.C. and *Porges* for the defendants. There was always risk of collision, and the *Empire Soldier* failed to keep clear either under the crossing rule or as a matter of good seamanship. She took helm action much too late. The *Wolfe's* convoy as a whole was entitled to right of way, and such vessels in the other convoy as were endangering the *Wolfe* should have obeyed the crossing rule: see *The British Integrity* (1). The *Wolfe's* duty was to keep her course and speed and she did not act too soon: *The Otranto* (2). There is no different duty whether the give-way ship is a single unit or one of a convoy:—c.f. *The Scottish Musician* (3).

[The *Treherbert* (4) was also referred to.]

Carpmael replied. *Cur. adv. vult.*

June 29. PILCHER J. read a judgment in which, after stating the facts, he continued as follows: It was contended by Mr. Carpmael that the collision was solely due to the fact that the *Wolfe* had a bad look-out. He pointed out that the *P.* and the *D.*, both of which vessels appreciated that they were meeting an unlighted convoy on a crossing course at a greater distance than the *Wolfe* had seen any vessel at all, had time to

(1) (1944) 77 Ll. L. Rep. 282.
(2) [1931] A. C. 194, 201.
(3) [1942] P. 128.
(4) [1934] P. 31.

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act and avoid all danger. He submitted that if those on board the *Wolfe* had seen what they should have seen they could have starboarded on to a course parallel with the northbound convoy as the *P.* did, or could have ported on to an opposite course as the *D.* did. It was common ground that the crossing rule as such did not apply to the situation which arose when the vessels came in sight of one another, but Mr. Carpmael contended that if the *Wolfe* could be absolved from blame for not appreciating the presence of the *Empire Soldier* and her convoy at an earlier moment, then good seamanship demanded that the requirements of the crossing rule should be complied with if danger of collision existed. He argued that on the facts no danger of collision existed, but that if it did exist the collision was solely brought about by the premature and violent starboard wheel action of the *Wolfe*, which on that basis was the stand-on ship. Mr. Hayward took his stand squarely on the obligation of each vessel to obey the crossing rule as a matter of seamanship. He submitted that danger of collision existed and persisted and that the *Empire Soldier* was to blame for failing to exhibit her lights in due time and for failing to starboard her wheel and/or stop or reverse her engines in due time. I am satisfied that the *Wolfe* did not see the units of the northbound convoy as soon as she could have done and that to that extent her look-out was defective. She ought to have seen at least as much as was seen from the *P.* and the *D.* and ought to have seen at a distance of more than half a mile several unlighted vessels on a northerly course and to have appreciated that these vessels were in all probability units of a convoy on a crossing course. I think it probable that if the *Wolfe* had had as good a look-out as the *P.*, and had decided to take the same action as the *P.* did, the collision might have been avoided. I am also satisfied that at a distance of about a mile, the second officer of the *Empire Soldier* identified the *Wolfe* as a particular ship for which he might have to take action, and that from this time onwards the bearing of the *Wolfe* never altered and risk of collision existed. No doubt it can be demonstrated that if the *Wolfe* had not made a substantial alteration to starboard during the last two or three minutes before the collision she might on the courses and speeds have passed just clear under the stern of the *Empire Soldier*. But, as Lord Buckmaster remarked in *The Otranto* (1), in dealing with the obligations of vessels under the crossing rule, " Acknowledging to the full the

(1) [1931] A. C. 194, 201.

"vital consequence of strict obedience, there still remains the "fact that these rules were made for the guidance of mariners "and not of mathematicians, and that it is not right, by an "elaborate process of calculation after the event, to decide "that the ship that was bound to keep her course acted a "little before the moment that in fact she need have done." The crossing rule, whether regarded as a rule or as a guide to good seamanship, is not designed to promote close shaves but to avoid risk of collision. I therefore hold that if good seamanship in this case demanded that the provisions of the note to art. 21 should be complied with, the circumstances were such as to bring it into operation.

The important question now falls to be considered, namely: What were the respective duties and obligations of the two vessels involved in this collision, being, as each of them was, a unit of a convoy approaching another convoy on a crossing course? While Admiralty notices to mariners have been issued dealing with the respective duties of single ships and convoys meeting in circumstances which may give rise to danger of collision, no official guidance has been given as to the action which is appropriate when convoy meets convoy, nor has this question been considered, so far as I am aware, in any reported case. No doubt owing to the fact that all convoys were routed by the naval authorities so that they should not become involved with each other, it was not thought necessary to deal with the unlikely situation of convoy meeting convoy. The situation having, however, arisen in this case, and it being possible that it may arise again in the Admiralty Court before all the litigation connected with the present war is disposed of, the respective obligations of units of meeting convoys are a matter of some interest and importance. In this particular case it is, moreover, impossible to avoid a consideration of the obligations and duties of the two vessels involved, because on the facts as I have found them the *Wolfe* could in all probability have avoided the collision if she had had a better look-out and had acted in the same fashion as the *P.*, which had hard-a-starboarded and got on to a parallel course with the *Empire Soldier*. If, however, good seamanship demanded that the *Wolfe* should obey the crossing rule, there was risk of collision, she was the stand-on ship, and she did the right thing, namely, stood on at a time when her bad look-out was operating, so that such bad look-out did not contribute to the collision. Similarly, the *Empire Soldier* took no action although she was the give-

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way ship. She expected the *Wolfe* to starboard and get on to a parallel course, and inasmuch as two out of the four vessels in the *Wolfe's* convoy in fact took this course that expectation can hardly be said to have been entirely unreasonable.

While no Admiralty notice to mariners deals in terms with the situation of convoy meeting convoy, notices have been issued dealing with the obligations of a single ship approaching convoys. The notice on this topic which was in force at the time of the collision was No. 7 of 1942, dated January 1, 1942. I only refer to this notice because, although not in terms applicable to the present case, it is the only notice which affords some guidance to mariners faced with a situation at all comparable to that which arose in this case. After warning single vessels to keep clear of convoys para. 4 of the notice provides as follows: " In circumstances when a single vessel has not taken " early measures to keep out of the way of a Squadron . . . . " the Regulations for Preventing Collisions at Sea must be " the guide." The drafting of this notice to mariners leaves something to be desired, but in view of the terms of para. 1 no doubt the word " squadron " in para. 4 must be taken to include " merchant vessels in convoy."

In *The Scottish Musician* (1), Langton J. had occasion to criticize the wording of this particular notice and it is not uninteresting to observe that on October 3, 1942, a further notice (No. 2175), dealing again with the obligations of single ships approaching convoys, was issued. It seems probable that this notice may have been issued as a result of the judge's observations in that case. The second notice omits all reference to the Regulations for Preventing Collisions at Sea being " the " guide." Paragraph 3 of the notice, however, points out that while a single ship should, if possible, keep clear of a convoy, if such ship becomes involved with the convoy, units of the convoy should " be ready to take such action as will best aid to avert " collision." This notice was not issued until just after the collision with which we are concerned. While it has no bearing on the present case, I may perhaps be forgiven for saying that it seems to me to be subject to some of the criticisms which Langton J. addressed to the earlier notice, and in addition to be liable to lead to confusion, in that it does not reproduce the only portion of the original notice which might have tended to produce uniformity of action in cases of difficulty, namely,

(1) [1942] P. 128.

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the reference to the Regulations for Preventing Collisions at Sea.

There being, then, no regulation or notice governing the action to be taken when convoys become involved with each other at night, and no suggestion that the *Empire Soldier's* convoy as a convoy should have given way to the *Wolfe's* convoy, although, under the crossing rule, each unit of the *Empire Soldier's* convoy was potentially a give-way ship and each unit of the *Wolfe's* convoy potentially a stand-on ship, the difficult point arises for consideration as to what was the duty of a unit of one convoy when faced with risk of collision with a unit of the other convoy. In this situation it seems reasonably clear that the respective duties of such vessels must be to size up the situation as it presents itself and act in accordance with the principles of good seamanship. While every master of a vessel in convoy is under a duty to keep station in his convoy he is also vitally concerned to see to the safety of his own ship. If, therefore, he is faced with risk of collision with another ship, whether a unit of his own convoy or not, his duty to preserve his own ship no doubt overrides his duty to keep station. While the collision regulations, as such, do not apply to the case under consideration, yet they constitute a code recognized by all maritime nations as a code well adapted for preventing collisions at sea. The instinct, moreover, of the experienced mariner would, I apprehend, be to act in accordance with those regulations when faced with sudden risk of collision, provided that there was time and opportunity to do so. The Admiralty notice to mariners No. 7 provides, as I have said, that when a single ship becomes involved in risk of collision with a unit of a convoy the collision regulations " shall be the " guide " as to the action to be taken. In this state of affairs my own inclination would be to hold that a unit of one convoy involved in risk of collision with a unit of another convoy on a crossing course should, as a matter of good seamanship, take the action prescribed by the collision regulations in order to avoid collision, provided that time and opportunity exist to do so. So to hold would at least have the merit of ensuring some uniformity of action.

The matter involving, as it does, a question of good seamanship is, however, essentially one for the Elder Brethren and I have asked them the following questions: (*a*) Was the *Empire Soldier* justified, as matter of seamanship, in standing on until she was between two and three cables distant from

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the *Wolfe*. Answer "No." (*b*) Was the situation such when the *Wolfe* took action that it could reasonably be anticipated by the *Wolfe* that collision could not be avoided by the action of the *Empire Soldier* alone? Answer, "Yes." (*c*) Could the *Empire Soldier* have starboarded sufficiently to clear the *Wolfe* without incurring risk of collision with the leader of the fourth column? Answer, "Yes." The Elder Brethren point out that while in their view good seamanship demanded, on the particular facts of this case, that each of the vessels involved should act in accordance with the requirements of the crossing rule, they would not be prepared, again on the facts of the present case, to condemn a vessel which, like the *P.*, took early action to get on to a parallel course with the approaching convoy, provided always that the units of such convoy were observed at a sufficient distance to enable the turn to be made in reasonable safety. I accordingly hold the *Empire Soldier* to blame for standing on in the way she did. In my view, good seamanship demanded that she, being the give-way ship, should have starboarded when the vessels were more than half a mile apart and at a time when the officer of the watch knew that his vessel and the *Wolfe* were and had been for some time approaching on crossing courses with risk of collision. A comparatively small alteration to starboard by the *Empire Soldier* would have sufficed to avoid this collision. If necessary her engines could have been eased or stopped to allow the *Wolfe* to get across her head. I think that the *Empire Soldier* is also to blame for failing to exhibit her lights at an earlier moment. If she had done so the *Wolfe* would almost certainly have become aware of her presence at a considerably earlier point of time, and might have taken the same course as the *P.* and thus avoided collision.

It remains to be considered whether the *Wolfe* was also to blame. Her look-out was defective, inasmuch as she never knew that she was approaching another convoy at all and did not see the loom of the *Empire Soldier* as soon as she could have done. She did, however, see the unlighted *Empire Soldier* at a distance of about half a mile, by which time it could not be suggested that the moment had arrived for her, as the stand-on ship, to take action under the note to art. 21. She made no substantial alteration of helm until she was about three cables distant from the *Empire Soldier*, and if she did go off a few degrees to starboard before this moment such alteration in no way contributed to the collision. When she did take drastic

helm and engine action I hold that she took the right action and that she did not take it too soon. The Elder Brethren agree with me. In these circumstances I find the *Empire Soldier* alone to blame. 1945 THE F. J. WOLFE.

Solicitor for plaintiff: *The Treasury Solicitor.*
Solicitors for defendants: *Thomas Cooper & Co.*

E. C. M. T.

END OF VOL. AND OF PROBATE SERIES FOR 1945.

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